Supreme Court, U.S.
FILED

97-296 AUG 8 1997

OFFICE OF THE CLERK

No. _____
In the Supreme Court of the United States
October Term, 1996

MICHIGAN DEPARTMENT OF
ENVIRONMENTAL QUALITY,

Petitioner,

v.

CPC INTERNATIONAL, INC., et. al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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August, 1997

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QUESTION PRESENTED

Whether a parent corporation can be held directly liable under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9607(a)(2), as an operator of its wholly-owned subsidiary's facility, based on the parent corporation's own actions in directing the operation of the facility at the time of disposal of hazardous substances.

LIST OF PARTIES

The Petitioner in this case was formerly known as the Michigan Department of Natural Resources (MDNR) and is now known as the Michigan Department of Environmental Quality (MDEQ).[1] However, for consistency with the proceedings in the courts below, the petition will continue to refer to the state agency as "MDNR."

Respondent CPC International Inc. is the only Respondent against whom Petitioner MDNR seeks relief in this petition, although Petitioner believes that the other Respondents continue to have an interest in the outcome of the petition.

The other Respondents are the United States of America, Cordova Chemical Company of Michigan, Cordova Chemical Company of California, and Aerojet General Corporation. Petitioner MDNR is informed that the United States is considering filing a petition for writ of certiorari seeking review of the judgment of the Court of Appeals.

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[1]On August 1, 1995, Governor John Engler issued Executive Order No. 1995-18, creating the Michigan Department of Environmental Quality (MDEQ) and transferring specified powers, authorities and duties from the MDNR to the MDEQ.

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OPINIONS BELOW

1. The published *en banc* decision of the Court of Appeals for the Sixth Circuit was filed on May 13, 1997 and is reported at 113 F.3d 572 (6th Cir. 1997); it is also reprinted in the Appendix. App. to Pet. 1a.

2. The published Order of the Court of Appeals for the Sixth Circuit granting rehearing *en banc* and vacating the Sixth Circuit panel decision was filed on October 19, 1995 and is reported at 67 F.3d 586 (6th Cir. 1995); it is also reprinted in the Appendix. App. to Pet. 43a.

3. The published decision of the panel of the Court of Appeals for the Sixth Circuit was filed on July 14, 1995 and is reported at 59 F.3d 584 (6th Cir. 1995); it is also reprinted in the Appendix. App. to Pet. 45a.

4. The published Opinion of the United States District Court for the Western District of Michigan was filed on August 27, 1991 and is reported at 777 F. Supp. 549 (W.D. Mich. 1991); it is also reprinted in the Appendix. App. to Pet. 85a.

JURISDICTION

Petitioner seeks review of a published *en banc* Opinion of the United States Court of Appeals for the Sixth Circuit in a case involving the interpretation of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.* The decision was filed on May 13, 1997. This Petition for Certiorari is filed within the 90 days of that May 13, 1997 Order.

The Opinion of the Sixth Court is in direct conflict with *Certain Underwriters at Lloyds, London v. St. Joe Minerals Corp.*, 90 F.3d 671 (2d Cir. 1996); *Schiavone v. Pearce*, 70 F.3d 248 (2d Cir. 1996); *United States v. TIC Investment Corp.*, 68 F.3d 1082 (8th Cir. 1995), *cert. denied*, ___ U.S. ___; 117 S. Ct. 50 (1996); *Lansford-Coaldale Joint Water Authority v. Tonolli Corp.*, 4 F.3d 1209 (3d Cir. 1993); *Jacksonville Elec. Auth. v. Bernuth Corp.*, 996 F.2d 1107 (11th Cir. 1993); *John S. Boyd Co. v. Boston Gas Co.*, 992 F.2d 401 (1st Cir. 1993), and *United States v. Kayser-Roth Corp.*, 910 F.2d 24 (1st Cir. 1990).

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the final judgment or decree of the Court of Appeals for the Sixth Circuit.

STATUTORY PROVISIONS

This case concerns the interpretation and application of the following statutory provisions, which are reproduced in the Appendix:

1. Section 101(20)(A) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601(20)(A). App. to Pet. 146a.

2. Section 101(21) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601(21). App. to Pet. 147a.

3. Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9607(a). App. to Pet. 148a.

CONCISE STATEMENT OF THE CASE

This case involves actions by the United States Environmental Protection Agency ("EPA") and by the Michigan Department of Natural Resources ("MDNR") to recover environmental response costs for cleanup at one of the most severely contaminated sites in the country. This petition seeks review of the Sixth Circuit *en banc* decision only as it pertains to the liability of CPC International, Inc. ("CPC"). Of relevance here, MDNR and EPA sought to recover their costs from CPC, a parent corporation that, through a wholly owned subsidiary, actively participated in the operation of a chemical manufacturing facility located near Muskegon, Michigan, at the time hazardous substances were improperly disposed of at the site. The operative facts relevant to CPC's conduct are not in dispute. What is at issue is whether these facts support a finding of liability under the proper legal standards.

Ott Chemical Company ("Ott I") operated a chemical manufacturing facility on the site from 1959 to 1965. From 1965 to 1972 the site was owned and operated by a wholly owned subsidiary of CPC, known as the Ott Chemical Company ("Ott II"). In 1972 Ott II/CPC sold the facility to Story Chemical Company. CPC's liability arises from its operation at the site from 1965 to 1972. Extensive contamination occurred during this time period.

During the Ott I and Ott II eras, chemical wastes were disposed of in unlined lagoons and hundreds of drums containing hazardous wastes were buried in a sandy pit. Hundreds of gallons of chemicals were spilled from train cars onto railroad tracks, hazardous substances were dumped in the woods, and there were frequent overflows of chemical wastes at a cement lined equalization basin. *CPC Int'l, Inc. v. Aerojet General Corp.*, 777 F. Supp. 549, 556 (W.D. Mich. 1991); App. to Pet. 89a. As a result of these disposal practices, the soil, surface water, and groundwater at the site became contaminated with a variety of hazardous substances.

This case was filed in the U.S. District Court for the Western District of Michigan pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.* CPC initiated this

lawsuit by filing claims against MDNR, Aerojet General Corporation and its subsidiaries, Cordova Chemical Company of California and Cordova Chemical Company of Michigan (the "Aerojet entities"), for contribution under CERCLA. *CPC Int'l, Inc. v. Aerojet General Corp., et. al.* (District Court Case No. 89-10503). MDNR filed a counter claim against CPC and a cross claim against Aerojet and its subsidiaries for cost recovery and contribution. The Aerojet entities also filed counter claims against CPC and cross claims against MDNR. The United States, on behalf of the EPA, filed a separate action asserting CERCLA cost recovery claims against CPC, the Aerojet entities and Arnold Ott. *United States v. Cordova Chemical Co., et. al.* (District Court Case No. 89-0961). The two actions were consolidated for discovery, trial and appeal. The district court had jurisdiction pursuant to section 113(b) of CERCLA, 42 U.S.C. § 9613(b).

After a fifteen-day bench trial, in which twenty-nine witnesses presented live testimony and more than 2,300 exhibits were admitted into evidence, the district court made extensive factual findings. *CPC Int'l, Inc.*, 777 F. Supp. at 555-70; App. to Pet. 91a-102a.

Based upon the factual findings, the district court found CPC directly liable as an operator of the facility at the time of disposal, under section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2):

> Liability attaches here because the evidence shows active participation and control by CPC in Ott II affairs both internally through the subsidiary's board and management and externally through the policies of the development company and the actions of individual CPC officials. The evidence shows a level of participation and control by CPC that exceeds the bounds of an interested investor and enters the realm of an active operator. When a parent corporation permeates the board, management and decision-making of a wholly owned subsidiary that was disposing of hazardous waste, operator liability directly attaches under CERCLA.

Id. at 575; App. to Pet. 126a.

On appeal, a divided panel of the Sixth Circuit reversed the district court's determination that CPC is liable as an operator. *United States v. Cordova Chemical Co.*, 59 F.3d 584, 590 (6th Cir. 1995); App. to Pet. 45a, *vacated*, 67 F.3d 586 (6th Cir. 1995); App. to Pet. 44a. The panel majority concluded that, as a matter of law, "a parent corporation incurs operator liability pursuant to subsection 107(a)(2) of CERCLA, for the conduct of its subsidiary corporation, only when the requirements necessary to pierce the corporate veil are met." *Id.* at 590; App. to Pet. 55a.

Judge Ryan, dissenting, concluded that a parent corporation, like any other "person" as defined in CERCLA, could be held liable as an "operator" under section 107(a)(2) of the act and the question as to whether CPC was an operator of the facility is simply a question of fact; *i.e.*, whether the parent corporation was an operator-in-fact of the facility.

Petitions by the United States and the MDNR for rehearing *en banc* were granted and the panel decision was vacated. *United States v. Cordova Chemical Co.*, 67 F.3d 586 (6th Cir. 1995); App. to Pet. 45a. An *en banc* Opinion was issued on May 13, 1997. *United States v. Cordova Chemical Co.*, 113 F.3d 572 (6th Cir. 1997); App. to Pet. 1a. In a seven-to-five split decision, the *en banc* majority held that a parent corporation will be liable only when the requirements to pierce the corporate veil under state law are met.

> [W]e . . . hold that where a parent corporation is sought to be held liable as an operator pursuant to 42 U.S.C. 9607(a)(2) based upon the extent of its control of its subsidiary which owns the facility, the parent will be liable only when the requirements necessary to pierce the corporate veil are met. In other words, under the circumstances of this case, whether the parent will be liable as an operator depends upon whether the degree to which it controls its subsidiary and the extent and manner of its

> involvement with the facility, amount to the abuse of the corporate form that will warrant piercing the corporate veil and disregarding the separate corporate entities of the parent and subsidiary.
>
> . . . Michigan appears to follow the general rule that requires demonstration of patent abuse of the corporate form in order to pierce the corporate veil. There must be such a unity of interest and ownership that the separate personalities of the corporation and its owner cease to exist, and the circumstances must be such that adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice.

Cordova Chemical Co., 113 F.3d at 580; App. to Pet. 11a-12a.

The dissenting opinion of Judge Ryan, in which four other judges joined, would have affirmed the district court decision finding CPC liable. It emphasized that the district court's findings concerning CPC's pervasive control of Ott II's activities at the facility were not found clearly erroneous, and based upon the findings of actual control, CPC was directly liable as an "operator" under section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2).

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW AND IT IS IN DIRECT CONFLICT WITH DECISIONS IN THE FIRST, SECOND, THIRD, EIGHTH AND ELEVENTH CIRCUITS.

The Sixth Circuit decision presents an important question of federal law. CERCLA was designed to foster remediation of the numerous sites of environmental contamination in this country. It has engendered a great deal of litigation as to the appropriate allocation between potentially liable parties of the cost of environmental remediation at countless sites across the nation. The issue at hand, whether a parent corporation can be held directly liable as an operator under section 107(a)(2) of CERCLA, concerns the interpretation of the critical terms "operator" and "person" under CERCLA. This petition seeks review of the fundamental principles of liability under CERCLA; specifically what does it mean to be an "operator" under CERCLA and how should courts interpret CERCLA's broad definition of "person". There is currently a conflict among the circuit courts of appeal as to how to interpret and apply these terms.

The Sixth Circuit's interpretation of CERCLA is in direct conflict with five other Circuit Courts that have found parent corporations directly liable as operators under CERCLA. *See*: *Certain Underwriters at Lloyds, London v. St. Joe Minerals Corp.*, 90 F.3d 671 (2d Cir. 1996); *Schiavone v. Pearce*, 70 F.3d 248 (2d Cir. 1996); *United States v. TIC Investment Corp.*, 68 F.3d 1082 (8th Cir. 1995), *cert. denied*, ___U.S.___; 117 S. Ct. 50 (1996); *Lansford-Coaldale Joint Water Authority v. Tonolli Corp.*, 4 F.3d 1209 (3d Cir. 1993); *Jacksonville Elec. Auth. v. Bernuth Corp.*, 996 F.2d 1107 (11th Cir. 1993); *John S. Boyd Co. v. Boston Gas Co.*, 992 F.2d 401 (1st Cir. 1993), and *United States v. Kayser-Roth Corp.*, 910 F.2d 24 (1st Cir. 1990); *but see Joslyn Mfg. Co. v. T. L. James & Co.*, 893 F.2d 80 (5th Cir. 1990).

In order to establish liability under CERCLA one must prove that: 1) a release of a hazardous substance has

occurred, 2) at a facility, 3) causing a plaintiff to incur response costs, 4) and the defendant is a responsible party as defined under section 107(a) of CERCLA, 42 U.S.C. § 9607(a). *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 668 (5th Cir. 1989); *United States v. Aceto Agricultural Chemical Corp.*, 872 F.2d 1373 (8th Cir. 1989).

The parties have stipulated to the first three elements set forth above. This petition involves the interpretation of the fourth element, or whether CPC is a responsible party under 42 U.S.C. § 9607(a). Section 107(a) reads, in part, as follows:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section --
>
> (1) the owner and operator of a vessel or a facility,
>
> (2) *any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,*
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, *shall be liable for* --

> *(A) all costs of removal or remedial action incurred by the United States Government or a State . . . .*

42 U.S.C. § 9607(a) (emphasis added); App. to Pet. 148a.

The term "owner or operator" is defined by section 101(20)(A)(ii) of CERCLA, 42 U.S.C. § 9601(20)(A)(ii); App. to Pet. 146a, as any person owning or operating such facility. One court has found that the circularity of the definition "strongly implies . . . that the statutory terms have their ordinary meanings rather than unusual or technical meanings". *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 861 F.2d 155 (7th Cir. 1988). As the dissenting opinion in the case at hand noted, the definition of owner explicitly excludes one whose ownership interests is merely that of a stockholder who does not participate in the management of a facility, "suggesting that one who does participate in management is accordingly susceptible to liability". *Cordova Chemical Co.*, 113 F.3d at 587 (Judge Ryan, *dissenting*) (*citing Kayser-Roth Corp.*, 910 F.2d at 26, n. 6; App. to Pet. 27a.

The definition of "owner or operator" indicates that Congress intended to impose liability on any entity actually operating a facility at the time of a release of hazardous substances. The form of the operator, be it a parent corporation, individual or other entity, is irrelevant. Numerous courts have imposed liability on the entity actually operating the facility, without regard to the entity's interest in the facility or its corporate form. *Certain Underwriters at Lloyds, London*, 90 F.3d 671 (parent corporation); *Schiavone*, 70 F.3d 248 (parent corporation); *FMC Corp. v. United States Dep't of Commerce*, 29 F.3d 833 (3d Cir. 1994) (*en banc*) (federal government); *Lansford-Coaldale Joint Water Authority*, 4 F.3d 1209 (parent corporation); *Jacksonville Elec. Auth.*, 996 F.2d 1107 (parent corporation); *John S. Boyd Co.*, 992 F.2d 401 (parent corporation); *Kaiser Aluminum and Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338 (9th Cir. 1992) (contractor/excavator); *Kayser-Roth Corp.*, 910 F.2d 24 (parent corporation); *TIC Investment Corp.*, 68 F.3d 1082 (parent corporation); *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837 (4th Cir. 1992) (tenant); *Sidney S. Arst Co. v.*

Pipefitters Welfare Educ. Fund, 25 F.3d 417 (7th Cir. 1994) (corporate officer); *U.S. v. Gurley*, 43 F.3d 1188 (8th Cir. 1994) (employee).

The Sixth Circuit's decision, holding that a parent corporation can only be held liable as an operator when the standards for piercing the corporate veil are met, is not supported by the plain language of section 107(a) of CERCLA. Under the Sixth Circuit's decision, the standard for determining whether a parent corporation is liable as either an owner or operator would be the same: the facts must support piercing the corporate veil. This interpretation ignores the disjunctive character of CERCLA liability, holding both an "owner" and "operator" liable. Owner liability and operator liability, however, denote two separate and distinct concepts.

The *Schiavone* court explained the importance of the distinction:

> This distinction has particular relevance in the context of parent and subsidiary corporations where the theory of liability selected mandates different bases of proof. A finding of *owner* liability invokes the parent-subsidiary relationship and can be made only in circumstances that permit corporate veil piercing. *USX Corp.*, 68 F.3d at 823 ("[T]raditional principles of corporate law would not permit 'owner' liability to be extended to a corporate parent unless piercing the corporate veil were warranted."); *John S. Boyd Co.*, 992 F.2d at 408; *Lansford-Coaldale*, 4 F.3d at 1220; *Solvent Chem.*, 875 F. Supp. at 1019. Such *owner* liability is entirely distinct from parent *operator* liability, proof of which looks to the independent actions of the parent corporation, evidenced through its control over the polluting site. *John S. Boyd Co.*, 992 F.2d at 408; *Lansford-Coaldale*, 4 F.3d at 1220; *Solvent Chem.*, 875 F.Supp. 1019. As the Third Circuit has explained:
>
> > Under CERCLA, a corporation may be held liable as an owner for the actions of

> its subsidiary corporation in situations in which it is determined that piercing the corporate veil is warranted. . . . Operator liability, in contrast, is generally reserved for those situations in which a parent or sister corporation is deemed, due to the specifics of its relationship with its affiliated corporation, to have had substantive control over the facility in question. *Lansford-Coaldale*, 4 F.3d at 1220 (citation omitted).

Schiavone, 79 F.3d at 254. *Also see*: *Sidney S. Anst. Co.*, 25 F.3d at 420; *Kayser-Roth*, 910 F.2d at 26; *Cordova Chemical Co.*, 113 F.3d at 588 (dissenting opinion).

The interpretation that a parent corporation can be held liable as an operator is also supported by the definition of "person":

> The term "person" means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body.

42 U.S.C. § 9601(21); App. to Pet. 147a. This definition clearly encompasses a parent corporation.

> "[P]erson" is defined broadly to include a firm, corporation, or commercial entity, among other things. CERCLA's language, therefore, indicates an intent to hold a corporation liable for the environmental violations of its subsidiaries and sister corporations, if it is otherwise determined to have operated the facility in question.

Lansford-Coaldale, 4 F.3d at 1221, n. 11. *Also see*: *Schiavone*, 79 F.3d at 255; *Kayser-Roth*, 910 F.2d at 26, n. 5.

The Sixth Circuit majority found that nothing in the statute warrants disregard of the "time honored limited

liability protections afforded by the corporate form", and adopted language from the Fifth Circuit: "[I]f Congress wanted to extend liability to parent corporations it could have done so and remains free to do so." *Cordova Chemical Co.*, 113 F.3d at 579-80; App. to Pet. 10a; *citing Joslyn Mfg. Co.*, 893 F.2d at 83. Both the Sixth Circuit and Fifth Circuit decision in *Joslyn Mfg. Co.* ignore the broad definition of "person" which clearly encompasses any corporation, including a parent corporation.[2] The plain language of CERCLA supports the district court's decision that a parent corporation can be held directly liable as an operator under CERCLA.

The Sixth Circuit's opinion is also highly critical of the numerous courts that have relied on CERCLA's remedial goals as justification for interpreting the statute broadly because the legislative history of the statute is sparse. *Cordova Chemical Co.*, 113 F.3d at 577-78; App. to Pet. 7a. The rule that remedial statutes should be liberally construed is firmly established. *Dennis v. Higgins*, 498 U.S. 439, 443; 111 S. Ct. 865, 868 (1991). Although the legislative history of CERCLA may be sparse on specific provisions, the remedial intent of the statute is clear from both the statute itself and its legislative history. *See*: *Anspec Co. Inc. v. Johnson Controls Inc.*, 922 F.2d 1240, 1241 (6th Cir. 1991); *United States v. R.W. Meyer, Inc.*, 889 F.2d 1497, 1500 (6th Cir. 1989) *cert. denied*, 494 U.S. 1057; 110 S. Ct. 1527; *Kayser-Roth*, 910 F.2d at 26; *Deadham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986); *New York v. Shore Reality*, 759 F.2d 1032, 1045 (2d Cir. 1985); *U.S. v. Alcan Aluminum Corp.*, 964 F.2d 252 (3d Cir. 1992).

The Sixth Circuit concludes that CERCLA should be narrowly construed:

> Thus, while the liability provisions concerning facility operators should be construed so that the financial responsibility falls upon those entities that contributed to the environmental problem, the widest net possible ought not be

[2] In *Riverside Market Dev. v. Intern Bldg. Products*, 931 F.2d 327 (5th Cir. 1991), the Fifth Circuit recognized that an individual corporate officer could be found liable as an operator under CERCLA, if the officer actively participated in the wrongful activities. The court noted that this personal liability as an operator is distinct from liability imposed through piercing the corporate veil.

> cast in order to snare those who are either innocently or tangentially tied to the facility at issue. . . .
>
> In turning to the specific facts now before us, we adhere to the tenet that liability attaches only to those parties who are culpable in a sense that, they by some realistic measure, helped to create the harmful conditions.

Cordova Chemical Co., 113 F.2d at 578; App. to Pet. 7a.

This proposed "tenet" ignores the text of the statute and the well established principle that liability under CERCLA is both strict and joint and several. *FMC Corp.*, 29 F.3d at 835; *Kayser-Roth*, 910 F.2d at 26. Moreover, as pointed out in the dissenting opinion, the district court decision holding CPC directly liable as an operator does not, in fact, rest exclusively or even primarily on the so-called remedial legislation "litany" denigrated by the majority opinion. *Cordova Chemical Co.*, 113 F.3d at 588 (dissenting opinion); App. to Pet. 28a.

The Sixth Circuit's two other main criticisms of the district court's decision regarding CPC's liability are equally untenable. First, the majority suggests that the district court improperly "replaces the relatively bright line provided by the traditional doctrine of piercing the corporate veil with a nebulous 'control' test." *Cordova Chemical Co.*, 113 F.3d at 580; App. to Pet. 54a. As discussed, *infra*, however, the actual control test of direct operator liability under CERCLA adopted by the district court and a majority of other Courts of Appeal is both workable and consistent with the statute. The majority opinion's observation that this standard is being used to "replace" the veil-piercing doctrine simply begs the question and confuses two alternative, independent bases of liability: direct statutory liability and common law vicarious liability. *Cordova Chemical Co.*, 113 F.3d at 588 (dissenting opinion); App. to Pet. 29a.

Second, the majority expresses concern that "the threat of unlimited liability will likely deter private sector participation in the cleanup of existing sites." *Cordova Chemical Co.*, 113 F.3d at 580; App. to Pet. 11a. That stated concern is

misplaced. To begin with, operator liability under the actual control standard is not, in fact, "unlimited". Furthermore, any deterrent effect on the acquisition of contaminated property stems from section 107(a)(1) of CERCLA, which imposes strict liability on current owners and operators of contaminated sites, not from the construction of the term "operator" adopted by the district court. Any such deterrent effect would be felt by all prospective owners and operators, not just parent corporations and is entirely distinct from the issue of CPC's operator liability under section 107(a)(2).

The courts which have considered the liability of parent corporations have developed various approaches for determining whether a parent corporation is an operator of a facility. The district court in the case at hand followed the approach set forth in *Kayser-Roth*, 910 F.2d at 27:

> In this court's view, then, a parent corporation is directly liable under section 107(a)(2) as an operator only when it has exerted power or influence over its subsidiary by actively participating in and exercising control over the subsidiary's business during a period of disposal of hazardous waste. A parent's actual participation in and control over a subsidiary's functions and decision-making creates "operator" liability under CERCLA; a parent's mere oversight of a subsidiary's business in a manner appropriate and consistent with the investment relationship between a parent and its wholly owned subsidiary does not.
>
> Factors to consider in assessing whether a parent corporation operated its subsidiary include the parent's participation in the subsidiary's board of directors, management, day-to-day operations, and specific policy matters, including areas such as manufacturing, finances, personnel and waste disposal. In addition, determining the origin and business function of the subsidiary in the context of the parent corporation's business may be helpful in determining whether the parent has operated a

> wholly owned subsidiary. Other evidence may be less probative if it is simply indicative of the actions of a prudent investor, rather than an active operator, including monitoring of a subsidiary's financial performance, consolidation of corporate business matters such as accounting and legal work, and cooperation between the subsidiary and the parent in research. In the final analysis, each case must be decided on its own unique facts and circumstances.

CPC Int'l, Inc., 777 F. Supp. at 573; App. to Pet. 123a.

The standard set forth by the district court in the case at hand is in accordance with the majority of other courts who have considered the issue. *See John S. Boyd*, 992 F.2d at 408; *Certain Underwriters*, 90 F.3d at 674; *Lansford-Coaldale*, 4 F.3d 1209; *Jacksonville Electric*, 996 F.2d 1107.

Although most of the courts considering the issue have found that actual control and active involvement with the activities of its subsidiary is necessary to establish operator liability, other courts have held that the authority to control is sufficient for establishing operator liability. *See Nurad*, 966 F.2d at 842; *Kaiser Aluminum*, 976 F.2d at 1344. *Idaho v. Bunker Hill Co.*, 635 F. Supp. 665, 670-71 (D. Idaho 1986); *United States v. Nicolet, Inc.*, 712 F. Supp. 1193 (E.D. Penn. 1989); *Kelley v. Thomas Solvent*, 727 F. Supp. 1532 (W.D. Mich. 1989). In adopting this standard the *Nurad* court reasoned it "placed accountability in the hands of those capable of abating further environmental harm".[3]

At trial MDNR and EPA proved that CPC had the ability to control and did, in fact, control the facility. The district court found that contamination occurred during the time period Ott II/CPC operated the site:

> The principal source of contamination at the site was the use of engineered, unlined lagoons at the northwestern edge of the site for chemical

[3]This petition should be granted to resolve the conflicts between the circuit courts of appeal as to the appropriate standard to be applied when determining whether a parent corporation is liable as an operator.

> waste disposal. From 1959 to at least 1968, during the Ott I and Ott II periods of ownership, wastewaters and other chemical waste used in the manufacturing process were discharged into the lagoons, where much of the contaminants seeped into the ground and water. No disposal into the lagoons occurred during the Story and Cordova periods.
>
> During the Ott I and Ott II era, chemical waste also entered the ground through the burial and slitting of hundreds of drums in a sandy pit; numerous spills of hundreds of gallons of chemicals from train cars onto railroad tracks; frequent overflows of chemical waste at a cement-lined equalization basin; and the dumping into the woods of buckets of hazardous chemicals that had spilled during the manufacturing process. Some spills of hazardous waste also occurred during the Story and Cordova periods of ownership.
>
> Contamination entering the ground from disposal in the lagoons or through spills then seeped into the ground and migrated away from the site via the aquifer to the southeast, ultimately reaching two waterways, Little Bear Creek and the Unnamed Tributary.

CPC Int'l, Inc., 777 F. Supp. at 556; App. to Pet. 89a.

The district court also found that the environmental problems at the site were exacerbated by CPC's involvement at the site:

> Following (CPC's) acquisition, Ott II production capacity significantly increased as CPC contributed millions of dollars to expansion efforts. This increase in production, in turn, created substantially greater amounts of wastewater and chemical waste in need of disposal in the unlined lagoons, which were expanded to accommodate increased wastes.

CPC Int'l, Inc., 777 F. Supp. at 558; App. to Pet. 93a.[4]

During the Ott II era, CPC was directly involved in the operation at the facility. The district court made extensive findings of fact as to CPC's pervasive control of the site. *CPC Int'l, Inc.*, 777 F. Supp. at 557-562, 575; App. to Pet. 93a-102a, 125a-126a. The district court found that CPC actively participated in and at times controlled the policy-making decisions of its subsidiary through its representation on the Ott II Board of Directors. CPC had majority control of the Ott II board for three years. CPC directors serving on the Ott II board reported back to CPC about Ott II programs and gave approval on behalf of CPC for appropriation requests. During CPC's entire period of ownership of Ott II, the chairman of the Ott II board was always a top ranking CPC executive. CPC matters were discussed at board meetings, and Ott II board members recognized the need to consider CPC's interest and seek strong guidance from the parent company during these sessions. *Id.* at 558-59; App. to Pet. 94a-95a.

CPC also actively participated in and exerted control over day-to-day decision making at Ott II. CPC actively participated in the decision making because high-ranking CPC officers served in Ott II management positions. The president of Ott II reported directly to the president of CPC. *Id.* at 559; App. to Pet. 95a. CPC officials played decisive roles in Ott II's policy-making structure. "CPC officials exerted significant control and bore ultimate responsibility over decision-making at the subsidiary in areas including waste disposal, sales, marketing, manufacturing, purchasing and personnel." *Id.*; App. to Pet. 96a.

The district court also found that CPC was directly and extensively involved with environmental matters at Ott II. CPC's governmental and environmental affairs director, G.R.D. Williams, coordinated all pollution activities for CPC and its divisions and subsidiaries, including Ott II. G.R.D. Williams became actively involved in environmental affairs at

[4]The Sixth Circuit ignores its own tenet in exonerating CPC from liability. The district found that CPC did, in fact, control environmental matters at the site, including waste disposal. *CPC Int'l, Inc.*, 777 F. Supp. at 561-562; App. to Pet. 99a-100a. Thus, although it is not necessary to establish culpability under CERCLA, CPC was, in fact, culpable or responsible for the waste problems at the site.

Ott II, including participating in negotiations with state regulators on waste disposal issues, suggesting stall tactics in dealing with state regulators, and directing Ott II on how to respond to inquiries from state and federal regulators. He actively participated and exerted control over Ott II environmental matters. *Id.* at 561; App. to Pet. 99a-100a.

CPC also exerted significant control over Ott II's finances and participated in labor negotiations at Ott II. *Id.* at 562; App. to Pet. 100a-101a. CPC provided staff services and employee benefit programs to Ott II; filed patents; developed, in a cooperative effort between Ott II and another CPC research facility, chemicals for use by CPC; and coordinated outside and accounting services. CPC provided these services without charge to Ott II. *Id.*; App. to Pet. 101a.

Based upon these extensive factual findings the district court found that CPC was liable as an operator. The court found that CPC's active participation and control of Ott II went beyond the bounds of an interested investor and that CPC had permeated the board, management, and decision-making of Ott II. *Id.* at 575; App. to Pet. 126a.

The Sixth Circuit *en banc* majority did not find any of the district court's findings of fact clearly erroneous. Instead it created a new legal standard that is not supported by the plain language of the statute and is in conflict with decisions in the First, Second, Third, Eighth and Eleventh Circuits. Under CERCLA, the term operator clearly encompasses a parent corporation such as CPC, who actively participated in and controlled the activities of its wholly owned subsidiary at the facility. CPC should be held liable as an operator of the facility.

CONCLUSION

For these reasons, Petitioner asks this Court to grant certiorari to resolve the conflict between the circuit courts of appeal and resolve an important dispute concerning the interpretation of CERCLA.

Respectfully submitted,

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August, 1997

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RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1997 FED App. 0154P (6th Cir.)
File Name: 97a0154p.06

Nos. 92-2288/2326

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

United States of America,
Plaintiff-Appellee,

v.

Cordova Chemical Company of Michigan; Cordova Chemical Company; Aerojet-General Corporation (92-2288),
Defendants-Appellants,

CPC International Inc. (92-2326),
Defendant-Appellant,

Michigan Department of Natural Resources,
Defendant-Appellee.

On Appeal from the United States District Court for the Western District of Michigan

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Decided and Filed May 13, 1997

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[2] Before: MARTIN, Chief Judge; MERRITT, KENNEDY, MILBURN, NELSON, RYAN, BOGGS, NORRIS, SILER, BATCHELDER, DAUGHTREY, and MOORE, Circuit Judges.

NORRIS, J., delivered the opinion of the court, in which KENNEDY, MILBURN, NELSON, BOGGS, SILER, and BATCHELDER, JJ., joined and in which MERRITT, J., joined as to Part III.C.3. MERRITT, J. (pp. 22-28), delivered a separate opinion concurring in part and dissenting in part. RYAN, J. (pp. 29-47), delivered a separate dissenting opinion in which MARTIN, C. J., DAUGHTREY, and MOORE, JJ., joined and in which MERRITT, J., joined as to Part I.

OPINION

ALAN E. NORRIS, Circuit Judge. This appeal highlights the difficulty that often attends the apportionment of liability for the clean-up costs of sites that have been subjected to long-term environmental degradation. In the present case, brought pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675 (1988 & Supp. V 1993), the environmental damage occurred over a period of decades and during the watch of several owners.

A central concern on appeal is the criteria required under CERCLA before a parent corporation can be held financially liable for pollution that occurred on a site owned by a subsidiary. Because we adopt a stricter standard than did the district court for imposition of such liability, we reverse certain of its determinations and remand for further proceedings.

I. PROCEEDINGS BELOW

In May and June 1991, the district court conducted a fifteen-day bench trial to determine which parties were responsible for clean-up costs related to pollution of a site located in Dalton Township, Michigan. In addition to the [3] live testimony of twenty-nine witnesses, the court received more than 2,300 exhibits and reviewed dozens of deposition transcripts. Given the complexity of the proceedings below, the factual findings contained in the district court's published opinion are extensive. *CPC Int'l, Inc. v. Aerojet-General Corp.*, 777 F. Supp. 549, 555-70 (W.D. Mich. 1991). We summarize them here by way of background.

Beginning in 1957, a series of owners used the Dalton

Township site to manufacture chemicals. The initial owner, the Ott Chemical Company ("Ott I"), controlled the site from 1957 until 1965. During this time, the groundwater flowing underneath the site became contaminated, a development confirmed by tests conducted in 1964.

Pollution of soil, surface water, and groundwater continued after the Ott Chemical Company ("Ott II"), a wholly owned subsidiary of CPC International, Inc. ("CPC"), took over ownership of the site in 1965. The use of unlined lagoons as a means of chemical waste disposal was the principal cause of the contamination. According to the district court, this practice spanned the period from 1959 until at least 1968.

Seepage from these lagoons did not, however, constitute the sole source of pollution that occurred during the ownership of Ott I and Ott II. Further contamination emanated from chemical spills from train cars, from chemical drums, from overflows of chemicals contained in a cement-lined equalization basin, and from other sources. Groundwater pollution did not go completely untreated during this time; from 1965 until 1974, purge wells were operated intermittently in an attempt to alleviate the problem.

In 1972, the Story Chemical Company ("Story") acquired the site from Ott II and continued to operate it until 1977, when bankruptcy ended operations. At that point, the [4] trustee in bankruptcy assumed title to the site and attempted to find a buyer.

Active governmental response to the pollution problems at the site began in 1977, after Story's bankruptcy, when the Michigan Department of Natural Resources ("MDNR") visited the site to assess the situation. In view of the severity of the environmental problems and the lack of resources to pay for a cleanup, the MDNR became active in an effort to attract a purchaser who would participate financially in clean-up efforts. This search led to the signing of a document on October 13, 1977, by the Cordova Chemical Company ("Cordova/California"), a wholly owned subsidiary of Aerojet-General Corporation ("Aerojet"), and the MDNR. The district court described the agreement and its aftermath:

It addressed the problem of environmental contamination at the property and set forth obligations with respect to cleanup activities. . . .

. . . .

. . . MDNR agreed to remedy the waste container and sludge problems, and Cordova/California agreed to eliminate the phosgene gas and give MDNR $600,000 to defray the costs of the agency's cleanup of the waste containers, sludge and residential wells.

. . . .

With respect to Cordova/California's $600,000 payment and the company's responsibility or liability for the contamination at the site it was acquiring, the [agreement] stated:

. . . .

> Cordova Chemical Company shall not have any responsibility or liability in connection with any [5] other corrective actions which the Department of Natural Resources or any other governmental agency may hereafter deem necessary . . . .

. . . .

However, the agreement did not provide for a total cleanup of the site's severe environmental problems. . . .

In particular, MDNR and Cordova/California did not reach an agreement regarding a remedy for the groundwater contamination problem. Instead, the fate of the groundwater problems was not resolved, with MDNR left to tackle the problem as part of its overall regulatory responsibility for the site.

. . . .

> . . . Cordova/California and MDNR fulfilled their cleanup obligations under the [agreement].

CPC Int'l v. Aerojet-General, 777 F. Supp. at 564-67.

Having executed this document, Cordova/California purchased the site the following day from the Story bankruptcy trustee. Cordova Chemical Company of Michigan ("Cordova/Michigan"), a wholly owned subsidiary of Cordova/California, acquired ownership of the site in 1978. Cordova/Michigan retains ownership, although manufacturing operations at the site ceased in 1986.

The district court made the following observations regarding conditions at the site during the ownership of the Cordova companies:

> During their period of operations, [the companies] neither buried waste nor dumped it [6] onto the ground. No chemical waste was disposed into the unlined lagoons that had been used during the Ott I and Ott II eras. Before beginning chemical manufacturing, Cordova/Michigan repaired the equalization basin and chemical sewer system. When operating, Cordova/Michigan discharged chemical waste through off-site disposal or to a sewer that flowed to the Muskegon County treatment facility.

Id. at 556. In short, although the preexisting groundwater contamination problem was not remedied during their ownership, the trial court concluded that neither Cordova/California nor Cordova/Michigan exacerbated the condition.[1]

The federal Environmental Protection Agency became involved in cleanup of the site in 1981. Since then, the EPA has formulated a long-term response to the environmental damage that has occurred at the site; the cost of this effort will

run into the millions of dollars.

II. CERCLA LIABILITY

Section 107(a) of CERCLA lists the parties who are potentially liable for the clean-up costs of a polluted site.[2] [7] 42 U.S.C. § 9607(a). For the purposes of this action, those parties include the present owner *and* operator of a facility from which there is a release of a hazardous substance, any prior owner *or* operator of a facility whose involvement coincided with disposal of a hazardous substance, and any person who arranged for the disposal or transport of hazardous waste from a facility. 42 U.S.C. § 9607(a)(1)-(3). The parties stipulated that the site is a "facility" as defined by CERCLA, that it contains "hazardous substances," that "releases" of hazardous substances have occurred and threaten to continue, and that CPC, the MDNR, Aerojet, Cordova/California, and Cordova/Michigan are "persons" as defined by the statute. *Id.* at 556.

Because courts that have been asked to render liability decisions in CERCLA actions frequently invoke the remedial purpose of the act, *e.g., United States v. Kayser-Roth Corp., Inc.*, 910 F.2d 24, 26 (1st Cir. 1990), *cert.* [8] *denied*, 498 U.S. 1084 (1991), we will review that subject before considering the liability of those parties now before us.

Congress enacted CERCLA as a "remedial statute designed to protect and preserve public health and the environment." *Kayser-Roth*, 910 F.2d at 26; *accord Schiavone v. Pearce*, 79 F.3d 248, 253-54 (2d Cir. 1996); *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1221 (3d Cir. 1993); *Anspec Co., Inc. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1241-42 (6th Cir. 1991) (reviewing this circuit's approach to CERCLA liability). Accordingly, courts generally will not interpret § 9607(a) in a way that apparently frustrates the statute's goals in the absence of specific congressional intent to the contrary. *Anspec*, 922 F.2d at 1247 (citing *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1045 (2d Cir. 1985)).

It must be recognized, however, that it is difficult to divine the specific, as opposed to the general, goals of Congress with respect to CERCLA liability since the statute

represents an eleventh hour compromise. *See generally Shore Realty Corp.*, 759 F.2d at 1039-42 (discussing legislative history). As the district court recognized, "some of CERCLA's provisions are vague and its legislative history sparse." *CPC Int'l v. Aerojet-General*, 777 F. Supp. at 571; *accord Anspec*, 922 F.2d at 1247 (characterizing the legislative history as "scant"); *Lansford-Coaldale Joint Water Auth.*, 4 F.3d at 1221 ("[C]ongressional intent may be particularly difficult to discern with precision in CERCLA, a statute notorious for its lack of clarity and poor draftsmanship.").

Courts would not be warranted, therefore, in pointing to the "remedial legislation" litany, *see generally* Norman J. Singer, 3 Southerland Statutory Construction § 60.01 (5th ed. 1992) (the rule that remedial statutes should be liberally construed is "firmly established"); *Dennis v. Higgins*, 498 U.S. 439, 443 (1991) (noting that 42 U.S.C. § 1983, as a remedial statute, should be liberally construed), as a reason [9] for filling in the blanks left by this sketchy legislative history to impose liability under nearly every conceivable scenario. Thus, while the liability provisions concerning facility operators should be construed so that financial responsibility for clean-up operations falls upon those entities that contributed to the environmental problem, the widest net possible ought not be cast in order to snare those who are either innocently or tangentially tied to the facility at issue. In fact, this court has pointed out that, "Congress intended that those responsible for disposal of chemical poisons bear the cost and responsibility for remedying the harmful conditions *they created*." *Anspec*, 922 F.2d at 1247 (emphasis added).

In turning to the specific facts now before us, we adhere to the tenet that liability attaches only to those parties who are culpable in the sense that they, by some realistic measure, helped to create the harmful conditions.

In its effort to discern the sweep of CERCLA liability, the district court concluded that:

> CERCLA broadens the potential for liability of parent corporations without discarding entirely the traditional concept of limited liability that is central to corporate law. . . .

> Accordingly, it seems that CERCLA's "owned or operated" language forges a *new, middle ground*. It is a ground that at once accommodates the general principle of limited liability and the broader principle of liability attaching for operative activity. To permit these principles to coexist under CERCLA, the liability of a parent corporation cannot attach simply because a parent has had involvement with its subsidiary in a manner merely consistent with their investment relationship. Rather, a parent must have actually operated the business of its subsidiary.[10]
>
> In this court's view, then, a parent corporation is directly liable under section 107(a)(2) as an operator only when it has exerted power or influence over its subsidiary by actively participating in and exercising control over the subsidiary's business during a period of disposal of hazardous waste. A parent's actual participation in and control over a subsidiary's functions and decision-making creates "operator" liability under CERCLA; a parent's mere oversight of a subsidiary's business in a manner appropriate and consistent with the investment relationship between a parent and its wholly owned subsidiary does not.

CPC Int'l v. Aerojet-General, 777 F. Supp. at 573 (emphasis added).

On the basis of this "new, middle ground," the district court found both CPC and Aerojet liable as operators for the disposal of hazardous substances that occurred while their subsidiaries operated the site.

III. DISCUSSION

A. CPC

The district court reasoned that liability potentially

could attach to CPC as a parent corporation in two ways: direct liability under CERCLA's "operator" language or by common law veil-piercing. Clearly, since the facility was titled in the subsidiary's name, CPC could be found liable as an owner *only* through veil piercing. The court determined that CPC was liable as an operator of the site for environmental damage that occurred during the ownership of Ott II; this liability was grounded in section 107(a)(2) of CERCLA, which renders "any person [liable] who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." 42 U.S.C. § 9607(a)(2). To reach this conclusion, the court necessarily had to hold [11] CPC, as a parent corporation, accountable for the environmental conduct of its wholly owned subsidiary corporation, Ott II. And, because the court held CPC directly liable as an operator, it did not reach the question of whether CPC was liable as an owner pursuant to the traditional common law doctrine of veil-piercing.

It is not at all clear from the district court's opinion whether the basis for finding parental liability as an operator under its "new, middle ground" is the actual operation of the subsidiary's business or, on the other hand, the exertion of power or influence through active participation in the subsidiary's business. Although they are used interchangeably in the district court's opinion, the two concepts are not interchangeable. If anything, the facts recited by the district court support liability under the latter standard but not under the former. This confusion underscores the inevitable difficulty that arises when courts attempt to erect new concepts of corporate liability within the framework of CERCLA in the absence of direction from Congress. We are not persuaded that, in enacting CERCLA, Congress contemplated the abandonment of traditional concepts of limited liability associated with the corporate form in favor of an undefined "new, middle ground."

Actually, another scenario occurs to us under which one could argue that a parent corporation should be deemed to have directly operated a facility owned by its subsidiary. At least conceivably, a parent might independently operate the facility in the stead of its subsidiary; or, as a sort of joint venturer, actually operate the facility alongside its subsidiary.

However, this is not a theory of operator liability relied upon by the district court, or alluded to in its opinion.

CERCLA defines the "owner or operator" of an onshore facility as "any person owning or operating such facility." 42 U.S.C. § 9601(20)(A)(ii). When the facility has been conveyed to a unit of state or local government, the [12] definition differs. It then includes "any person who owned, operated or otherwise controlled activities at such facility immediately [before the transfer to the governmental authority]." 42 U.S.C. § 9601(20)(A)(iii). It thus appears that the drafters of the statute distinguished an operator from a person who "otherwise controlled" a facility. When the owner of a facility contracts out the daily running of the operation to a third party, that party presumably attains operator status (and its attendant liability). However, when a parent corporation actively participates in the affairs of its subsidiary consistent with the restrictions imposed by traditional corporations law, nothing in the definition just cited or in the rest of the statute indicates that the parent has assumed the role of operator.

Despite the definition of "owner or operator," several circuits, like the district court below, have determined that parent corporations can attain operator status by exerting significant control over the operations of their subsidiaries. *See, e.g., Kayser-Roth*, 910 F.2d at 26-27; *Schiavone*, 79 F.3d at 255; *Lansford-Coaldale Joint Water Auth.*, 4 F.3d at 1221; *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 842 (4th Cir.), *cert. denied*, 113 S. Ct. 377 (1992); *CPC Int'l v. Aerojet-General*, 777 F. Supp. at 572-73.

While some may wish to extend the reach of CERCLA to maximize the impact of its remedies, nothing in the statute or its legislative history warrants the invocation by courts of vague, expansive concepts, such as the district court's "new, middle ground," which threaten the efficacy of time-honored limited liability protections afforded by the corporate form. As the Court of Appeals for the Fifth Circuit has noted in this context, "[i]f Congress wanted to extend liability to parent corporations it could have done so, and it remains free to do so." *Joslyn Mfg. Co. v. T.L. James & Co., Inc.*, 893 F.2d 80, 83 (5th Cir. 1990).

The district court's approach presents a number of problems. First, it replaces the relatively bright line [13] provided by the traditional doctrine of piercing the corporate veil with a nebulous "control" test. When, precisely, is a parent acting in a manner consistent with its investment relationship as opposed to a manner that triggers operator liability? The indicia enumerated by the district court, such as participation in the subsidiary's board of directors and involvement in specific policy decisions, offer little guidance. Certainly, these activities are not grounds traditionally relied upon as warranting the disregard of separate corporate existences.

Second, the threat of unlimited liability will likely deter private sector participation in the cleanup of existing sites. The case before us illustrates this point. There is no dispute that the MDNR actively sought a private sector partner to take over and assist in the remediation of the site. Aerojet indicated an interest on the condition that it could cap its potential liability for environmental cleanup, which it sought to accomplish through the negotiation of the agreement with the MDNR and the use of subsidiaries.[3] To scuttle such sensible and legitimate precautions in favor of an unpredictable "control" test would actually contravene the public interest by discouraging businesses from being involved in such projects.

Accordingly, we reject the district court's "new, middle ground" as the basis for fixing operator liability and hold that where a parent corporation is sought to be held liable as an operator pursuant to 42 U.S.C. § 9607(a)(2) based upon the extent of its control of its subsidiary which owns the facility, the parent will be liable only when the requirements necessary to pierce the corporate veil are met. In other words, under the circumstances of this case, whether the parent will be liable as an operator depends upon whether the degree to which it controls its subsidiary and the extent and manner of its involvement with the [14] facility, amount to the abuse of the corporate form that will warrant piercing the corporate veil and disregarding the separate corporate entities of the parent and subsidiary.

Whether the circumstances in this case warrant a

piercing of the corporate veil will be determined by state law. *See Anspec*, 922 F.2d at 1248. Michigan appears to follow the general rule that requires demonstration of patent abuse of the corporate form in order to pierce the corporate veil. There must be such a unity of interest and ownership that the separate personalities of the corporation and its owner cease to exist, and the circumstances must be such that adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice. 1 William M. Fletcher, Fletcher Cyclopedia of the Law of Private Corporations § 41.30 (perm. ed. rev. vol. 1990); Stephen H. Schulman et al., Michigan Corporation Law & Practice § 3.9(c) (1991 Supp.); *Seasword v. Hilti, Inc.*, 449 Mich. 542, 548, 537 N.W.2d 221, 224 (1995) (corporate veil may be pierced where the subsidiary is a "mere instrumentality" of the parent and the separate corporate existence is used to subvert justice or cause result contrary to clearly overriding public policy); *see also Bodenhamer Bldg. Corp. v. Architectural Research Corp.*, 873 F.2d 109, 111-12 (6th Cir. 1989) (surveying Michigan corporate veil-piercing decisions). Organization of a corporation for the avowed purpose of avoiding personal responsibility does not in itself constitute fraud or reprehensible conduct justifying a disregard of the corporate form. *Gledhill v. Fisher & Co.*, 272 Mich. 353, 359, 262 N.W. 371, 373 (Mich. 1935).[4] [15]

The district court relied upon a number of factors in determining that CPC "actively participated in and exerted significant control over Ott II's business and decision-making" and was therefore directly liable under 42 U.S.C. § 9607(a)(2) as an operator: 100% ownership of Ott II; participation on Ott II's board of directors; a cross-pollination of officers who were involved in decision-making and daily operations; active participation by CPC officials in environmental matters; and financial control of Ott II through approval of budgets and capital expenditures. *CPC Int'l v. Aerojet-General*, 777 F. Supp. at 575. While these factors reveal a parent that took an active interest in the affairs of its subsidiary, they do not indicate such a degree of control that the separate personalities of the two corporations ceased to exist and that CPC utilized the corporate form to perpetrate the kind of fraud or other culpable conduct required before a court can pierce the veil. While CERCLA contemplates allocating financial responsibility to those corporations that cause

environmental degradation, it does not authorize assignment of liability to parent corporations that abide by the proper use of the corporate form.

In summary, then, it seems to us that under the "owned or operated" language of 42 U.S.C. § 9607(a)(2), there are three scenarios under which a parent corporation could be held liable for the disposal of hazardous substances at a facility whose owner of record was the parent's subsidiary corporation. First, as an owner, by piercing the corporate veil. Second, as an operator, where the parent directly operates the facility itself, either independently of its subsidiary, or as an actual co-operator alongside the subsidiary.[5] Although a parent conceivably could be held liable under this theory, it is not the one relied upon by the [16] district court, and, in any event, is not supported by the facts in the record before us.

Finally, operator liability may be based upon the conduct of the parent in the course of its affiliation with its subsidiary, including the degree of control exerted by the parent over its subsidiary. This is the scenario utilized by the district court, relying upon its "new, middle ground" standard to define the circumstances under which the parent will be liable. As pointed out above, we conclude that this "new, middle ground" is unworkable, and that traditional veil piercing is the only standard under which this scenario for liability can be assessed reliably.

Accordingly, the district court's finding of operator liability with respect to CPC must be reversed.

B. MDNR Liability

The district court rejected liability claims that were advanced against the MDNR on two fronts: as an operator and as an "arranger." Only the district court's decision regarding arranger liability is appealed.

CERCLA imposes liability on

> any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for

> disposal or treatment of hazardous substances owned or possessed by such person, by any other party or entity, at any facility . . . owned or operated by another party or entity and containing such hazardous substances.

42 U.S.C. § 9607(a)(3).

It is contended that the MDNR incurred arranger liability when it negotiated with Cordova/California for the acquisition of the site and agreed with Cordova/California on a plan to clean up the groundwater contamination.[17]

We agree with the district court's conclusion that the MDNR escapes liability because its actions were taken in response to the Act's environmental emergency provision:

> No state or local government shall be liable under this subchapter for costs or damages as a result of actions taken in response to an emergency created by the release or threatened release of a hazardous substance generated by or from a facility owned by another person. This paragraph shall not preclude liability for costs or damages as a result of gross negligence or intentional misconduct by the State or local government. For the purpose of the preceding sentence, reckless, willful, or wanton misconduct shall constitute gross negligence.

42 U.S.C. § 9607(d)(2). Our reading of the record indicates that the MDNR acted in good faith when attempting to address the groundwater contamination of the site. That its efforts proved to be less than entirely successful is unfortunate, but does not subject the agency to liability.[6]

C. *Liability of Aerojet and its Subsidiaries*

1. *Owner Liability*

The district court held both Aerojet and Cordova/Michigan liable as present owners of the site under CERCLA'S section 107(a)(1) which assigns liability to "the

owner and operator of a . . . facility." 42 U.S.C. [18] § 9607(a)(1). Cordova/Michigan does not challenge this decision on appeal and we therefore express no opinion with respect to its liability.

As for the parent corporation, Aerojet could be found liable as an owner only through veil piercing, since Cordova/Michigan was the owner of record. The district court appropriately looked to Michigan law to determine whether to pierce the corporate veil and, in its view, the evidence supported a conclusion that Aerojet had "totally dominated Cordova/Michigan, creating a complete identity of interests between the parent and its wholly owned subsidiary." *CPC Int'l v. Aerojet-General*, 777 F. Supp. at 578. Accordingly, the court determined that it was appropriate to pierce the corporate veil. Among the grounds cited for its decision, the court highlighted the total ownership by the parent, Aerojet's active participation in the acquisition of the site, the timing of the incorporation of the subsidiaries, cross-pollination of corporate officers, financial control, and the integration of the businesses. *Id.* at 577.

These facts, however, fall somewhat short of what is required to pierce the corporate veil under Michigan law. They do not establish that Cordova/Michigan was a mere instrumentality of Aerojet in the sense that the separate corporate personalities of the parent and subsidiary ceased to exist. More tellingly, they do not reveal activity by Aerojet that approaches the level of culpable conduct contemplated by Michigan law as a predicate to disregarding the separate corporate form. *Bodenhamer Bldg. Corp.*, 873 F.2d at 112. While Aerojet obviously sought to limit its liability for existing environmental problems through good faith negotiation with the MDNR and prudent use of the corporate form, there is nothing to suggest that the company acted to subvert justice or with fraudulent intent or otherwise sought to distort the legitimate purposes of the corporate form. Although Aerojet took an active interest in its subsidiaries, the record does not support a conclusion that Cordova/Michigan was [19] not a viable corporate entity. Accordingly, the district court erred when it pierced the corporate veil to assign liability to Aerojet as an owner.

The district court also noted that Cordova/California actually owned the site from October 1977 until November 1978. Although the company began clean-up operations as required by its agreement with the MDNR, the district court found that additional releases of hazardous substances occurred during this period. *CPC Int'l v. Aerojet-General*, 777 F. Supp. at 579. It thus imposed liability on Cordova/California as a former owner pursuant to section 107(a)(2).

This conclusion, however, conflicts with the district court's summary of activity at the site during the ownership of the Cordova companies. *Id.* at 556. On remand, therefore, we ask the district court to indicate with greater specificity precisely which portions of the record it relies upon to support a finding that additional releases of hazardous substances occurred during Cordova/California's brief ownership. Absent such evidence, liability cannot attach to Cordova/California as a former owner of the site.

2. *Operator Liability*

Finally, we turn to the district court's alternative imposition of liability on Aerojet pursuant to section 107(a)(2), precisely the same basis for liability that we have already discussed, and rejected, with respect to CPC. Since we decline to adopt the "new, middle ground" control test utilized by the district court, no liability attaches unless the corporate veil can be pierced. And because the record does not support veil piercing, Aerojet cannot be held liable as an operator pursuant to section 107(a)(2).

3. *Defenses*

Upon remand, the district court should also revisit its treatment of the defense raised by Aerojet, [20] Cordova/California, and Cordova/Michigan under section 107(b)(3). The pertinent part of the statute follows:

> [A] person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were *caused* solely by--

. . . .

> (3) an act or omission of a third party other than . . . one whose act or omission occurs *in connection with* a contractual relationship, existing directly or indirectly, with the defendant . . . if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, . . . and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions . . . .

42 U.S.C. § 9607(b) (emphasis added).

In parsing the exceptions to the defense, the district court noted that under 42 U.S.C. § 9601(35)(A), the term "contractual relationship" includes deeds transferring title. Thus, the district court concluded that a defense would be unavailable to a defendant who had a direct or indirect contractual relationship with the parties responsible for contaminating the site. *CPC Int'l v. Aerojet-General*, 777 F. Supp. at 581. Under this view, the defense could not be invoked by any defendant who was a party to a deed with a polluter. The district court, however, ignored the requirement that, in order to render the defense inapplicable, the hazardous substance release must have resulted from the act of a third party "in connection with" the contractual relationship with the defendant. The "in connection with" language of the defense appears to have [21] been designed to preclude a person from escaping liability by contracting for a third party to do his dirty work for him.

As we pointed out above, from what we glean from the district court's recitation of facts, the release of hazardous substances appears to have been *caused* solely by the predecessors of these three defendants.

IV. CONCLUSION

For the foregoing reasons, the district court is **reversed** in part and **affirmed** in part and this cause is **remanded** to the district court for further proceedings consistent with this opinion.

[1]The district court noted that two hazardous chemicals -- benzene and 1,2 dichloroethane -- were found at the site and used during the Cordova period of ownership. *Id.* at 556, 579 n.11. Although Cordova/Michigan, in an April 5, 1984 letter to the federal EPA, acknowledges generating small quantities of these materials for disposal, we find nothing in the record to support a finding that any additional release of hazardous substances occurred at the site during the Cordova period.

[2]42 U.S.C. § 9607(a) states, in part:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section--
>
> (1) the owner and operator of a . . . facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances . . .
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, . . . from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for--
>
> (A) all costs of removal or remedial action... .

[3]Although it does not affect our resolution of the liability issue, we note that these negotiations occurred before the enactment of CERCLA.

[4]We do not conclude, as suggested by the dissent, "[t]hat piercing the corporate veil under Michigan law requires showing that the corporate form was used to 'subvert justice.'" Rather, it requires that the subsidiary be a "mere instrumentality" of the parent which is used *either* to subvert justice *or* to circumvent overriding public policy. In our view, none of these factors fairly characterize the relationship between CPC and Ott II.

[5]Thus, the dissent's characterization of our opinion as holding "that a parent cannot, as a matter of law, be held directly liable under 42 U.S.C. § 9607(a)(2) as an 'operator' of a facility owned by its subsidiary corporation" is mistaken.

[6]We note that, since this case was briefed and argued, the Supreme Court decided *Seminole Tribe of Fla. v. Florida*, 116 S. Ct. 1114 (1996), which potentially provides the MDNR with an Eleventh Amendment defense. Because this issue has not been raised by the parties through supplemental briefs and the resolution of the case with respect to the MDNR is not affected, we choose not to consider the impact of *Seminole Tribe* at this point in the proceedings.

MERRITT, Circuit Judge, concurring in part and dissenting in part. I concur in part I of Judge Ryan's opinion, which would hold CPC International directly liable as an operator. I also concur in part III.C.3. of Judge Norris' opinion for the Court and support remanding the case for further findings regarding the Aerojet defendants' assertion of the "third-party" defense, CERCLA § 107(b)(3), 42 U.S.C. § 9607(b)(3), and for further findings regarding whether or not disposal of hazardous substances occurred while the Aerojet defendants owned the site. Unlike Judges Ryan and Norris, however, I believe that federal common law governs the question of whether Cordova/California and Aerojet are liable as current owners pursuant to CERCLA § 107(a)(1), 42 U.S.C. § 9607(a)(1), rather than Michigan's doctrine of piercing the corporate veil. Since the district court improperly analyzed this question using Michigan state law, I would remand the case for further findings.

I. State Law v. Federal Common Law

Several of the parties argue that Cordova/Michigan, the nominal owner of the site, is an alter ego of Cordova/California and Aerojet and that Cordova/California and Aerojet should thus be held liable as owners under the doctrine of piercing the corporate veil. Resolution of this issue first requires deciding whether the question is governed by state law or federal common law.

It is well-established that actions arising under nationwide federal programs are governed by federal law. *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979). But federal law can incorporate applicable state law doctrines in appropriate circumstances. *Id.* at 727-28. In *Kimbell Foods*, the Supreme Court enumerated the factors a court must consider in deciding whether to apply state law or federal common law. "[F]ederal programs that 'by their nature are and must be uniform in character throughout the Nation' necessitate formulation of controlling federal rules," *id.* at 728 (quoting *United States* [23] *v. Yazell*, 382 U.S. 341, 354 (1966)), but courts must also consider "whether application of state law would frustrate specific objectives of the federal programs" and "the extent to which application of a federal rule would disrupt commercial relationships predicated on

state law." *Id.*

Under the *Kimbell Foods* test, federal common law standards for piercing the corporate veil should be applied in CERCLA actions against parent corporations. All three of the *Kimbell Foods* factors support using a uniform federal standard.

> In attempting to eliminate the dangers of hazardous wastes, CERCLA presents a national solution to a nationwide problem. One can hardly imagine a federal program more demanding of national uniformity than environmental protection. Congress did not intend that the ability of the executive to fund the clean up of hazardous waste sites should depend on the attitudes of the several states toward parent-subsidiary liability in general, or CERCLA in particular. The need for a uniform federal rule is especially great for questions of piercing the corporate veil, since liability under the statute must not depend on the particular state in which a defendant happens to reside.

In re Acushnet River & New Bedford Harbor Proceedings re Alleged PCB Pollution, 675 F. Supp. 22, 31 (D. Mass. 1987).

Congress intended for CERCLA to cast a wide net of responsibility for the costs of environmental cleanup. Uniform national standards of liability are necessary to effectuate this goal. Following state law in this area would allow corporations to easily evade their environmental responsibilities under CERCLA by incorporating subsidiaries in states with stringent standards for piercing the corporate veil. *See* 126 Cong. Rec. H11787 (daily ed. Dec. 3, 1980) (statement of Rep. Florio, CERCLA House sponsor) ("[t]o insure the development of a uniform rule [24] of law, and to discourage business dealings in hazardous substances from locating primarily in States with more lenient laws, the bill will encourage the further development of a Federal common law in this area"). In addition, states' interests in regulating corporations are strongest with respect to internal affairs of the corporation, and are less compelling with respect to external affairs such as

shareholder liability to outside parties. *See* Henry Hansmann & Reinier Kraakman, *A Procedural Focus on Unlimited Shareholder Liability*, 106 Harv. L. Rev. 446, 450-53 (1992) (arguing that choice of law concerns do not bar unlimited shareholder liability in tort actions); Note, *Piercing the Corporate Veil: The Alter Ego Doctrine Under Federal Common Law*, 95 Harv. L. Rev. 853, 862-63 (1982) (arguing that piercing the corporate veil relates to external affairs and should be governed by the law of the forum); *cf. First Nat'l City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 621 (1983) ("As a general matter, the law of the [country] of incorporation normally determines issues relating to the internal affairs of a corporation. . . . Different conflicts principles apply, however, where the rights of third parties external to the corporation are at issue." (citations omitted)).

Federal precedents support using a federal common law standard for piercing the corporate veil to determine parent corporation CERCLA liability. Although few circuit courts have considered the issue, *compare Lansford-Coaldale Joint Water Authority v. Tonolli Corp.*, 4 F.3d 1209, 1225 (3d Cir. 1993) (applying federal common law) *with Joslyn Manufacturing Co. v. T.L. James & Co.*, 893 F.2d 80 (5th Cir. 1990) (affirming a district court opinion that declined to address the choice of law question on the grounds that the standard for piercing the corporate veil are the same under state and federal law), district courts have overwhelmingly applied federal common law in this context. *Idylwoods Assocs. v. Mader Capital, Inc.*, 915 F. Supp. 1290, 1305 (W.D.N.Y. 1996); *Atlantic Richfield Company v. Blosenski*, 847 F. Supp. 1261, 1278 (E.D. Pa. [25] 1994); *City of New York v. Exxon Corp.*, 112 B.R. 540, 552 (S.D.N.Y. 1990), *aff'd on other grounds*, 932 F.2d 1020 (2d Cir. 1991); *United States v. Kayser-Roth Corp.*, 724 F. Supp. 15, 20 (D.R.I. 1989), *aff'd on other grounds*, 910 F.2d 24 (1st Cir. 1990); *United States v. Nicolet, Inc.*, 712 F. Supp. 1193, 1201 (E.D. Pa. 1989); *In re Acushnet River & New Bedford Harbor Proceedings re Alleged PCB Pollution*, 675 F. Supp. 22, 30-31 (D. Mass. 1987); *cf. Jacksonville Elec. Auth. v. Eppinger and Russell Co.*, 776 F. Supp. 1542, 1545-46 (M.D. Fla. 1991) (applying Fifth Circuit standard without discussing the choice of law question), *aff'd on other grounds sub nom Jacksonville Elec. Auth. v. Bernuth Corp.*, 996 F.2d 1107 (11th Cir. 1993); *United States v. Mottolo*, 695 F. Supp. 615, 624 (D.N.H. 1988) (holding

parent corporation liable without piercing the corporate veil because "CERCLA places no importance on the corporate form").

Additional support for using a federal common law standard comes from cases involving successor corporation liability under CERCLA. Although this Court has previously relied on state law in that context, *see Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240 (6th Cir. 1991), other circuits that have considered this issue have applied federal common law. *See B.F. Goodrich v. Betkoski*, 99 F.3d 505, 519 (2d Cir. 1996); *United States v. Carolina Transformer Co.*, 978 F.2d 832 (4th Cir. 1992); *Louisiana-Pacific Corp. v. Asarco, Inc.*, 909 F.2d 1260 (9th Cir. 1990); *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86 (3d Cir. 1988); *see also United States v. Mexico Feed and Seed Co.*, 980 F.2d 478, 487 n.9 (8th Cir. 1992) (stating in dicta that federal common law should probably be applied).[1] [26]

II. The Proper Federal Standard

Piercing the corporate veil is an equitable doctrine. "The federal common law in this area emerges from the general principle that 'a corporate entity may be disregarded in the interests of public convenience, fairness and equity.'" *In re Acushnet River & New Bedford Harbor Proceedings re Alleged PCB Pollution*, 675 F. Supp. 22, 33 (D. Mass. 1987) (quoting *Town of Brookline v. Gorsuch*, 667 F.2d 215, 221 (1st Cir. 1981)); *see also American Bell Inc. v. Federation of Tel. Workers*, 736 F.2d 879, 886 (3d Cir. 1984) ("the appropriate occasion for disregarding the corporate existence occurs when the court must prevent fraud, illegality or injustice, or when recognition of the corporate entity would defeat public policy or shield someone from liability for a crime"). Two elements are generally regarded to be essential to pierce the corporate veil: "First, the dominant corporation must have controlled the subservient corporation, and second, the dominant corporation must have proximately caused plaintiff harm through misuse of this control." *Krivo Indus. Supply Co. v. National Distillers & Chem. Corp.*, 483 F.2d 1098, 1103 (5th Cir. 1973).

Although some cases require a showing of fraud, *see, e.g., Edwards Co. v. Monogram Indus.*, 730 F.2d 977, 980-81 (5th

Cir. 1984), even jurisdictions that require such a showing in some circumstances often recognize that fraud is not always required. *See, e.g., United States v. Jon-T Chems., Inc.*, 768 F.2d 686, 692-93 (5th Cir. 1985) (finding that fraud is not required to pierce the veil in tort cases even though fraud is required in contract cases). Courts applying federal common law have found that fraud is not required to pierce the corporate veil. *See, e.g., Valley Fin., Inc. v. United States*, 629 F.2d 162, 172 (D.C. Cir. 1980). Requiring a showing of fraud would be [27] particularly inappropriate in CERCLA cases. The fraud requirement appears to arise from the equitable nature of the piercing doctrine. The public policy considerations underlying CERCLA, however, provide a sufficient equitable basis for piercing the corporate veil whether or not fraud has been shown. This conclusion is further supported by CERCLA's limited deference to corporate form. *See United States v. Mottolo*, 695 F. Supp. 615, 624 (D.N.H. 1988); *United States v. Kayser-Roth Corp.*, 724 F. Supp. 15, 23-24 (D.R.I. 1989), *aff'd on other grounds*, 910 F.2d 24 (1st Cir. 1990).

Similarly, the proximate cause element should not be required in CERCLA cases, because Congress has provided statutory liability criteria. If a CERCLA defendant is a potentially responsible party under CERCLA § 107, 42 U.S.C. § 9607, then no further finding of proximate causation should be required.

The test for piercing the corporate veil under federal common law in CERCLA cases thus should be simply whether the parent corporation "controls or at the relevant time controlled the management and operations of the subsidiary." *United States v. Nicolet, Inc.*, 712 F. Supp. 1193, 1202 (E.D. Pa. 1989). Federal courts applying this standard in CERCLA cases have relied on one of two tests: a twelve-factor test set out in *United States v. Jon-T Chems., Inc.*, 768 F.2d 686, 691-92 (5th Cir. 1985); *see Jacksonville Elec. Auth. v. Eppinger and Russell Co.*, 776 F. Supp. 1542, 1545 (M.D. Fla. 1991), *aff'd on other grounds sub nom Jacksonville Elec. Auth. v. Bernuth Corp.*, 996 F.2d 1107 (11th Cir. 1993); *Joslyn Corp. v. T.L. James & Co.*, 696 F. Supp. 222, 227 (W.D. La. 1988), *aff'd*, 893 F.2d 80 (5th Cir. 1990); or a seven-factor test set out in *In re Acushnet River & New Bedford Harbor Proceedings re Alleged PCB Pollution*, 675 F. Supp. 22, 33 (D. Mass. 1987); *see Idylwoods*

Assocs. v. Mader Capital, Inc., 915 F. Supp. 1290, 1305 (W.D.N.Y. 1996); *City of New York v. Exxon Corp.*, 112 B.R. 540, 553 (S.D.N.Y. 1990), *aff'd on other grounds*, 932 F.2d 1020 [28] (2d Cir. 1991); *United States v. Kayser-Roth Corp.*, 724 F. Supp. 15, 20 (D.R.I. 1989), *aff'd on other grounds*, 910 F.2d 24 (1st Cir. 1990). These tests overlap, and neither list of factors is exhaustive. Piercing the corporate veil requires a fact-specific inquiry taking into account all of these factors and any other pertinent circumstances. The trier of fact must consider the totality of the circumstances to determine whether the parent controls or controlled the management and operations of the subsidiary.

Because the district court applied Michigan law rather than the proper federal common law standard for piercing the corporate veil, I would remand the case for further review under the proper standard.

[1] The Eleventh Circuit recently applied state law to determine the CERCLA liability of limited partners, *see Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489 (11th Cir. 1996). That is not necessarily inconsistent with applying federal law in claims involving subsidiary corporations, however, since the danger of corporations creating subsidiary partnerships, as compared to subsidiary corporations, in order to evade CERCLA liability is fairly attenuated.

[29] RYAN, Circuit Judge, dissenting. My colleagues' opinion today reaches three important and dispositive conclusions:

> That a parent corporation cannot, as a matter of law, be held directly liable under 42 U.S.C. § 9607(a)(2) as an "operator" of a facility owned by its subsidiary corporation, but may face only vicarious liability under state-law corporation-veil-piercing principles;
>
> That piercing the corporate veil under Michigan law requires circumstances showing that the corporate form was used to "subvert justice"; and
>
> That the district court erred in finding that the defendants failed to prove their entitlement to the so-called third-party defense under 42 U.S.C. § 9607(b)(3).

In my judgment, the court is mistaken on all three grounds, and I therefore respectfully dissent.

I.
Direct Liability of a CPC Under Section 107(a)(2)

A.
Parent Corporations as "Operators"

CERCLA identifies two distinct categories of individuals or entities that may be held directly liable, as responsible parties, for the costs of cleanup of an environmentally contaminated facility:

> (1) the owner *and* operator of a vessel or a facility, [or]
>
> (2) any person who at the time of disposal of any hazardous substance owned *or* operated any facility at which such hazardous substances were disposed of[.]

42 U.S.C. § 9607(a) (emphasis added). The parties have

stipulated that the site is a "facility" as defined by [30] CERCLA, and that the site contains "hazardous substances."

The terms "owner" and "operator," as used in section 107(a)(2), are defined in the statute as "any person owning or operating such facility," 42 U.S.C. § 9601(20)(A)(ii), a definition that is, at best, circular and unhelpful. At least one court has observed that "[t]he circularity strongly implies . . . that the statutory terms have their ordinary meanings rather than unusual or technical meanings." *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 861 F.2d 155, 156 (7th Cir. 1988). Further, it is noteworthy that the definition of "owner" explicitly excludes one whose ownership interest is merely that of a stockholder and who does not participate in management of the facility, 42 U.S.C. § 9601(20)(A)(iii), suggesting that one who *does* participate in management is accordingly susceptible to liability, *see United States v. Kayser-Roth Corp.*, 910 F.2d 24, 26 n.6 (1st Cir. 1990). Finally, "person" is defined expansively as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." 42 U.S.C. § 9601(21). The breadth of this definition plainly leaves room for a parent corporation. *See Kayser-Roth*, 910 F.2d at 25 n.5.

The first question presented by this appeal is whether a parent corporation may be considered an "operator" under section 107(a)(2) when its subsidiary is the "owner." The district court determined that a parent corporation may face potential liability as an operator of a contaminating facility because the plain language of section 107(a)(2) indicates that Congress intended to impose liability on *any* entity actually operating a facility, regardless of the nature of the entity's ostensible interest in the facility. It is a conclusion with which I agree; indeed, it is a conclusion that the vast majority of circuits--eight out of nine considering the question--have reached as well. *Certain Underwriters at Lloyd's, London v. St. Joe Minerals Corp.*, 90 F.3d 671, [31] 673-74 (2d Cir. 1996); *Schiavone v. Pearce*, 79 F.3d 248, 253-55 (2d Cir. 1996); *FMC Corp. v. United States Dep't of Commerce*, 29 F.3d 833, 842 (3d Cir. 1994) (*en banc*); *Lansford-Coaldale Joint Water Authority v. Tonolli Corp.*, 4 F.3d 1209, 1221-22 (3d Cir. 1993); *Jacksonville Elec. Auth. v. Bernuth Corp.*, 996 F.2d 1107, 1110 (11th Cir.

1993); *John S. Boyd Co. v. Boston Gas Co.*, 992 F.2d 401, 408 (1st Cir. 1993); *see Kaiser Aluminum and Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1341-42 (9th Cir. 1992); *Kayser-Roth Corp.*, 910 F.2d at 27; *see also United States v. TIC Investment Corp.*, 68 F.3d 1082, 1091-92 (8th Cir. 1995), *cert. denied*, 117 S. Ct. 50 (1996); *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 842 (4th Cir. 1992); *cf. Sidney S. Arst Co. v. Pipefitters Welfare Educ. Fund*, 25 F.3d 417, 420 (7th Cir. 1994). *But see Joslyn Mfg. Co. v. T.L. James & Co.*, 893 F.2d 80 (5th Cir. 1990).

My colleagues offer several reasons for parting company with this impressive wealth of authority. First, they argue that courts have relied on the so-called remedial purpose of CERCLA to justify their conclusion that CERCLA should be given an expansive meaning, including a meaning that admits of liability for parent corporations as operators. Certainly, the shibboleth "remedial purpose" is a weak basis for legal analysis and I do not find it necessary to resort to it. But what the majority sees as the logical second step to a rejection of the remedial-purpose litany, namely, its "adhere[nce] to the tenet that liability attaches only to those parties who are culpable in the sense that they, by some realistic measure, helped to create the harmful conditions," is, to put it mildly, a *non sequitur*. (Slip op. at 9.) Implicit in the majority's chosen "tenet" is rejection of the universally accepted principle that liability under CERCLA is both strict, as well as joint and several. *See, e.g., Kayser-Roth*, 910 F.2d at 26; *FMC Corp.*, 29 F.3d at 835. Whether CERCLA's purpose is "remedial" or not, the sounder proposition, I think, is that liability attaches only to those entities whom Congress has singled out for liability. For the reasons set forth below, the [32] statutory language leaves no room to doubt that Congress has singled out operators for liability, irrespective of their corporate form.

The majority is also critical of the district court's language that liability should be predicated on a "new, middle ground," and contends that this choice of language makes it unclear "whether the [district court's] basis for finding parental liability as an operator . . . is the actual operation of the subsidiary's business or . . . the exertion of power or influence through active participation in the subsidiary's business." (Slip op. at 11.) It may be that trial courts' inventive "new,

middle ground" expression is more conferring than clarifying, but my colleagues' conclusion that the district court's *holding* "threaten[s] the efficacy of time-honored liability protections afforded by the corporate form," simply does not follow. And my colleagues' ultimate conclusion, that a parent can only be found liable "when the requirements necessary to pierce the corporate veil are met," contradicts the plain language of section 107(a)(2). Moreover, it is a conclusion that begs the question this case presents, which, under subsection (a)(2), is not whether a parent corporation may be held vicariously liable for abuse of its subsidiary's corporate form--clearly it may--but whether Congress has created *direct* liability if the facts show that the parent corporation was the actor actually operating a contaminating facility. Stated differently, the issue is whether Congress has excused a parent corporation that is *in fact* operating a contaminating facility from direct liability, simply because it is doing so in the name of a corporate subsidiary. The majority's belief that such an excuse may be found in the statute does not, for me, withstand close scrutiny.

The structure of the statute, on its face, requires a recognition that "'owner' liability and 'operator' liability denote two separate concepts and hence require two separate standards for determining whether they apply." *Lansford-Coaldale*, 4 F.3d at 1220. "'CERCLA's language . . . indicates an intent to hold a corporation [33] liable for the environmental violations of its subsidiaries and sister corporations, if it is otherwise determined to have operated the facility in question.'" *Schiavone*, 79 F.3d at 255 (quoting *Lansford-Coaldale*, 4 F.3d at 1221 n.11). As the *Kayser-Roth* court observed,

> Congress, by including a liability category in addition to owner ("operators") connected by the conjunction "or," implied that a person who is an operator of a facility is not protected from liability by the legal structure of ownership. Given this grammatical construction and the broad definition of "person," corporate status, while relevant to determine ownership, cannot shield a person from operator liability.

Kayser-Roth, 910 F.2d at 26; *see Schiavone*, 79 F.3d at 254. In

short, direct CERCLA liability under subsection (a)(2) may be predicated on one's status as an owner *or* on one's status as an operator.

Alternatively, of course, a parent corporation may also be *derivatively* liable if circumstances warrant piercing the corporate veil in order to treat that parent corporation as an owner, when its subsidiary is in fact the owner. The majority opinion conflates and confounds the two types of liability, which are analytically distinct, and erroneously concludes that the latter is the exclusive basis for liability. *See Sidney S. Arst Co.*, 25 F.3d at 420; *cf. Schiavone*, 79 F.3d at 253. As a result, the majority's analysis founders on a perceived tension between the standard of a derivative liability arising out of common-law principles of corporate law and the standard of direct liability arising out of an application of the statutory language of CERCLA. The tension is chimerical. The statute explicitly provides for distinct, direct operator liability, and "the basis for such operator liability is wholly independent of any liability on the part of" the subsidiary, *Schiavone*, 79 F.3d at 254; it is a direct liability that "stem[s] directly from [the parent's] control over the plant," that is, its own actions as an [34] operator, *id.* The mere fact that *derivative* owner liability requires a veil-piercing analysis simply does not speak to the appropriate analysis of *direct* operator liability.

As previously alluded to, many courts have analyzed the issue of direct operator liability of a parent corporation. Most have followed the approach of *Kayser-Roth*, in which the court declared that "[t]o be an operator requires more than merely complete ownership and the concomitant general authority or ability to control that comes with ownership. At a minimum it requires active involvement in the activities of the subsidiary." 910 F.2d at 27. "This standard requires an investigation into the relationship between the parent and subsidiary, in order to reveal the requisite level of corporate involvement." *John S. Boyd*, 992 F.2d at 408. Thus, the degree of control required is "more . . . than simple ownership and the general authority or control that comes with it." *Certain Underwriters*, 90 F.3d at 674. In *Lansford-Coaldale*, 4 F.3d 1209, the court embraced the *Kayser-Roth* standard, emphasizing that "operator liability may be established even without evidence that a [parent] corporation controlled the

environmental decisions of an affiliated corporation as long as there exist other factors which sufficiently demonstrate pervasive control." *Id.* at 1222 n.13. Similarly, in *Jacksonville Electric*, 996 F.2d 1107, the court agreed that the test for direct parent corporation liability as an operator was whether the parent "'exercises actual and pervasive control of the subsidiary to the extent of actually involving itself in the daily operations of the subsidiary. Actual involvement in decisions regarding the disposal of hazardous substances is a sufficient, but not a necessary, condition to the imposition of operator liability.'" *Id.* at 1110 (citation omitted). As is clear from the language of these cases, and as the *Kayser-Roth* court emphasized, it would "obviously not [be] the usual case that the parent of a wholly owned subsidiary is an operator of the subsidiary." *Kayser-Roth*, 910 F.2d at 27; *see John S. Boyd*, 992 F.2d at 408. [35]

Among the many courts that have recognized that a parent corporation may be directly liable as an operator under section 107(a)(2), there has been a difference of opinion "as to whether operator liability should be predicated on the actual control one corporation has over the other, or whether the corporation's capacity or authority to control is sufficient." *Lansford-Coaldale*, 4 F.3d at 1220. The minority view has been adopted by the Fourth and Ninth Circuits, which would hold a parent corporation directly liable as an operator not because the parent corporation actually controlled the subsidiary, but rather because it had the authority to do so. *See, e.g., Nurad*, 966 F.2d at 842; *Kaiser Aluminum*, 976 F.2d at 1341. Those courts have justified their test as "one which properly declines to absolve from CERCLA liability a party who possessed the authority to abate the damage caused by the disposal of hazardous substances but who declined to actually exercise that authority by undertaking efforts at a cleanup." *Nurad*, 966 F.2d at 842.

This view, I think, goes too far, because it assigns liability to the parent corporations beyond that intended by Congress. But in holding, as the majority of circuits have, that a parent corporation may be liable when it actually operates the facility in question, a court simply faithfully interprets plain statutory language.

Only the Fifth Circuit has adopted the limited view of operator liability described in the majority opinion here, in which the corporate form of the alleged operator is dispositive. The *Joslyn* court framed its inquiry as being whether to "impose direct liability on parent corporation for the violations of their wholly owned subsidiaries." *Joslyn*, 893 F.2d at 81. This somewhat disingenuous framing of the question ignores the direct link contemplated by the majority of other courts that have discussed operator liability, and suggests that operator liability for parent corporations, like owner liability, would simply be another type of derivative liability, albeit of a less demanding nature than corporate-veil-piercing. The *Joslyn* court [36] reasoned that because "CERCLA does not [explicitly] define 'owners' or 'operators' as including the parent company of offending wholly-owned subsidiaries," *id.* at 82, there can be no operator liability for parents in the absence of veil-piercing. This analysis completely misses the point, which is that since a parent corporation is certainly within the statutory definition of "person," the relevant question is simply whether the particular corporation was, in fact, an operator of the facility in question. Thus, the *Joslyn* court's invitation to Congress to "extend liability to parent corporations" if it wishes to do so, *id.* at 83, is simply meaningless. It is obvious that CERCLA *does* extend liability to all corporations, including parent corporations, so long as they satisfy the statutory prerequisite that they be operators. I note, too, that another panel of the Fifth Circuit, in a case decided after *Joslyn*, observed in *dicta* that individual shareholders or officers could be held directly liable as an operator, when "they themselves actually participate in the wrongful conduct prohibited by the Act," and recognized that "this personal liability is distinct from the derivative liability that results from 'piercing the corporate veil.'" *Riverside Mkt. Dev. Corp. v. International Bldg. Prods., Inc.*, 931 F.2d 327, 330 (5th Cir. 1991). The *Riverside* holding indicates, at a minimum, a reluctance within the Fifth Circuit to broadly apply *Joslyn*.

In sum, I conclude, as the district court did, that a parent corporation may be held directly liable as an operator of a contaminating facility under section 107(a)(2) if the facts of the case show that its domination and control of the subsidiary corporation ostensibly operating the facility is so pervasive that the parent is the operator in fact.

B.
CPC's Liability Under Section 107(a)(2)

In addition to generally repudiating the possibility of direct operator liability for parent corporations, which has been adopted in a majority of circuits considering the [37] question, my colleagues have a factual dispute with the district court. That is, given my conclusion that CERCLA plainly contemplates the possibility of direct operator liability for parent corporations, the analysis necessarily turns to whether such liability is appropriately imposed here: whether CPC, as a factual matter, operated the facility. My colleagues acknowledge that, *arguendo*, "where the parent directly operates the facility itself, either independently of its subsidiary, or as an actual co-operator alongside the subsidiary," liability would be appropriate, but they assert that this theory "is not the one relied upon by the district court and, in any event, is not supported by the facts in the record before us." (Slip op. at 16.) This assertion simply belies the record and the district court's opinion, and further, it fails to recognize that our review on this point is limited to review for clear error. *Lansford-Coaldale*, 4 F.3d at 1219; *John S. Boyd*, 992 F.2d at 408; *Kayser-Roth*, 910 F.2d at 27.

The district court found that CPC, Ott II's parent corporation, so totally and completely controlled Ott II that CPC was the actual operator of the contaminating facility in Dalton Township, Michigan. There is an abundance of evidence in the record to support this factual finding, and in all events, not even my colleagues claim it is clearly erroneous. It follows, therefore, as the district court found, that CPC is directly liable under section 107(a)(2) as the operator of the site. I agree.

Section 107(a)(2) provides that a parent corporation is liable if it is the operator-in-fact of the facility as indicated by the extent of its domination and control of the subsidiary, the ostensible operator. The district court pointed out that some of the factors relevant to deciding whether the parent is the operator-in-fact include considerations such as the parent corporation's involvement in the subsidiary's board of directors and daily operations, and the parent corporation's

control over the subsidiary's policy making in areas such as personnel, finance, and waste disposal. Also relevant are the facts leading up to [38] the subsidiary's origin and the reasons for its existence, and the parent's level of financial monitoring and its cooperation or consolidation with the subsidiary's accounting, legal, and research functions.

The specific facts with regard to CPC, as found by the district court, are these:

From CPC's acquisition of Ott II in October 1965 through April 1966, all four directors on Ott II's board were CPC officers. Over the next three and one-half years, at least three of the eight board members were officers of CPC, and for the following two and one-half years, until CPC sold Ott II, CPC officials comprised the majority of the then eleven-director board. At all times during Ott II's existence, the chairman of its board was a high-level CPC executive, appointed by CPC's president. In addition, the managers of Ott II who exerted active control over the subsidiary's day-to-day activities also were officers of CPC. Arnold Ott, who had been chief executive officer of Ott I, continued as Ott II's chief executive officer until 1969, during which time he also was CPC's vice president for scientific research and president of CPC's development company, a subsidiary with oversight responsibility for several CPC subsidiaries including Ott II. In addition, James Eiszner, who had been Ott I's vice president of marketing, served as Ott II's president from 1967 to 1970. During Eiszner's tenure with Ott II, he also served as vice president of CPC's development company, and eventually became CPC's chief executive officer. Moreover, Eiszner, in particular, was criticized during his tenure as an Ott II official for paying too much attention to his CPC responsibilities and not enough attention to Ott II. Beverly Warner served as Ott II's chief executive officer from 1970 until it was sold in 1972, at the same time serving as president of CPC's development company.

Not only did CPC participate in Ott II's environmental matters via the CPC's environmental affairs director, [39] G.R.D. Williams, but it was instrumental in setting Ott II's environmental policies. For example, because Williams did not believe Ott II needed a biological waste treatment facility,

Ott II officers abandoned presenting plans for such a facility at a meeting with the state of Michigan. Moreover, Williams repeatedly controlled the interaction between Ott II officials and state and federal regulators, and instructed Ott II's officers "to consult with CPC before responding to regulatory questionnaires or other inquiries." *PC Int'l, Inc. v. Aerojet-General Corp.*, 777 F. Supp. 549, 561 (W.D. Mich. 1991). Finally, as the district court found, CPC's involvement in Ott II's financial affairs involved more than mere review and oversight. For example, CPC made loans to Ott II in excess of $5 million, while assuming many of Ott II's existing loans. In addition, CPC commingled its funds with Ott II's funds. CPC also limited the amount of capital expenditures that Ott II could approve without further approval by CPC's board of directors. As to personnel matters, CPC repeatedly participated in Ott II's labor negotiations with local unions.

Based on these and many other findings, the district court concluded that "[t]he evidence shows a level of participation and control by CPC that exceeds the bounds of an interested investor and enters the realm of an active operator." *Id.* at 575. These findings are amply supported in the record. As I have said, my colleagues do not claim they are clearly erroneous. Accordingly, the district court's conclusion that CPC was directly liable under section 107(a)(2) as an operator should be affirmed.

II.
Aerojet's Liability Under Section 107(a)(1)

The district court found Aerojet liable as a present "owner" of a contaminated facility under section 107(a)(1). It did so after finding that the facts justified piercing the corporate veil that thinly shielded Cordova/Michigan from Aerojet. My colleagues hold that [40] the district court erred because it misapplied Michigan law: "[The district court's findings do] not suggest that the company acted to subvert justice or with fraudulent intent or otherwise sought to distort the legitimate purposes of the corporate form." (Slip op. at 20.)

While there is no question that fraudulent intent or a subversion of justice justifies piercing the corporate veil, there is ample authority under Michigan law for finding parent

corporation liability through veil piercing for a less egregious reason, such as unjustified use of the corporate form. Indeed, the Michigan Supreme Court has only recently restated the applicable rule:

> Michigan law presumes that, absent some abuse of corporate form, parent and subsidiary corporations are separate and distinct entities. This presumption, often referred to as a "corporate veil," may be pierced only where an otherwise separate corporate existence has been used to "subvert justice or cause a result that [is] contrary to some other clearly overriding public policy." *More specifically, Michigan courts have generally required that a subsidiary must "become 'a mere instrumentality' of the parent" before its separate corporate existence will be disregarded.*

Seasword v. Hilti, Inc., 537 N.W.2d 221, 224 (Mich. 1995) (emphasis added) (citations omitted); *see Wells v. Firestone Tire and Rubber Co.*, 364 N.W.2d 670, 675 (Mich. 1984); *Herman v. Mobile Homes Corp.*, 26 N.W.2d 757, 762-63 (Mich. 1947); *Potter v. Michigan Bell Tel. Co.*, 224 N.W. 438, 439 (Mich. 1929). But the most instructive language of *Seasword*, for purposes of this case, is in the court's illustrative listing of "relevant factors . . . showing that a subsidiary is a 'mere instrumentality' of its parent":

> [T]he parent and subsidiary shared principal offices, or had interlocking boards of directors or frequent interchanges of employees, that the subsidiary is the [41] parent's exclusive distributing arm, or the parent's revenues are entirely derived from sales by the subsidiary.

Seasword, 537 N.W.2d at 224 n.10.

The coincidence between these hypothetical factors and the reality of Aerojet's relationship with its subsidiaries is, to put it mildly, striking. The district court found that Aerojet was the 100% shareholder of Cordova/California; that Cordova/California, in turn, was the sole shareholder of

Cordova/Michigan; and that the boards of directors of Cordova/California and Cordova/Michigan were titular only, not even convening for meetings. At least twenty Aerojet officers simultaneously held the same or nearly identical positions in Cordova/California and Cordova/Michigan. Aerojet so completely controlled the finances of all companies that neither Cordova/California nor Cordova/Michigan were permitted to maintain separate bank accounts. In addition, there was evidence that Aerojet used Cordova/Michigan by transferring to Cordova/California millions in worthless debt owed to Aerojet by Cordova/Michigan, effectively canceling debt owed by Aerojet to Cordova/California. These findings are supported by the record and are not clearly erroneous. The evidence established that Cordova/Michigan operated as a "mere instrumentality" of Aerojet.

Even more compelling are the findings of the district court regarding Cordova/Michigan's corporate purpose. When Aerojet began negotiations with MDNR for the Dalton Township property, Aerojet negotiated side-by-side with its then-unincorporated division, Cordova. After Aerojet entered two short-term stipulations with MDNR, and merely eleven days before the sale was concluded, Aerojet incorporated Cordova as a wholly-owned subsidiary. Although Aerojet had initially drafted the stipulation and consent order with MDNR, it was "Cordova Chemical Company" that actually signed the agreement. Then, in November 1978, with the remodeling of the [42] facility complete and manufacturing about to begin, Cordova/California incorporated Cordova/Michigan, transferring to it Cordova/California's ownership of the facility. Despite the separate corporate form of Cordova/Michigan, throughout operations, Aerojet actively participated in negotiations with prospective buyers for the possible sale of the facility. Once Cordova/Michigan ceased operations at the site, it was Aerojet that took responsibility for leasing portions of the site to third parties. It is clear that Aerojet took pains to insulate itself from environmental liability for the situation they knew existed at the site. Aerojet admits as much in its brief:

> By using well-capitalized, non-fraudulent, separate corporate subsidiaries, such as Cordova/California and then Cordova/

> Michigan, Aerojet could justify an attempt to reclaim and make the waste Site productive without risking all of its corporate assets. A rule of law imposing enormous environmental liability on parent corporations whose subsidiary neither perpetrated a fraud nor contributed to actual contamination would result in contaminated waste sites being permanently abandoned as unproductive, orphan properties, because no rational corporate officer could support a decision to rehabilitate a contaminated site if such liability were unavoidable.

Thus, Aerojet admits that Cordova/Michigan was established solely as a facade, to avoid any legal obligation to pay for further environmental cleanup at the site. Under Michigan law, its admission is sufficient to justify piercing the corporate veil. *See Potter*, 224 N.W. at 440. As Aerojet points out, it is possible that a refusal to allow a prospective purchaser of a contaminated site to avoid liability will result in a scarcity of willing buyers. Certainly, both EPA and MDNR have a substantial interest in locating conscientious purchasers, who are willing to reclaim environmentally corrupt facilities. However, there is no evidence that the Michigan courts would view this interest as an exception to the state's veil-piercing standard, [43] especially in light of the competing interest in imposing environmental cleanup costs on private industry rather than on taxpayers. Congress certainly was not deterred by this argument, given its balancing of interests in favor of imposing liability on new owners. Moreover, Aerojet and the Cordovas are not blameless, as they would have the court believe. The district court found that the entities actively contributed to the contamination and then failed to take remedial action, despite knowledge that contamination was continuing to migrate.

Accordingly, the district court's conclusion that, by piercing the corporate veil, Aerojet may be held liable as an *owner* under 42 U.S.C. § 9607(a)(1) should be affirmed.

I further agree with the district court that Aerojet was directly liable as an *operator* under section 107(a)(2):

> In light of the same facts that were probative in concluding Aerojet is liable under section 107(a)(1), the court concludes that Aerojet operated the site through active participation and pervasive control over the businesses of both Cordova/California and Cordova/Michigan.
>
> As with CPC's involvement with Ott II, Aerojet's participation and control over the board, management and decision-making at Cordova/California and Cordova/Michigan shows that the parent operated the facility. Aerojet's conduct toward its subsidiaries extended well beyond the activities that are merely indicative of a parent's general oversight of a wholly owned subsidiary.
>
> Accordingly, the court concludes the [sic] Aerojet is directly liable as an operator under section 107(a)(2).

CPC Int'l, Inc., 777 F. Supp. at 580.[44]

III.

Third-Party Defense Under Section 107(b)(3)

Finally, I do not agree that the district court should be required, upon remand, to "revisit its treatment of the [third-party] defense raised by Aerojet, Cordova/California, and Cordova/Michigan" under section 107(b)(3). (Slip op. at 21.) To succeed under section 107(b)(3), the defendants are required to prove *all* four elements of a third-party defense, which are:

> 1. That they did not contribute to the contamination;
>
> 2. That they were not in a direct or indirect contractual relationship with any person who, in connection with the contractual relationship, caused the contamination;

> 3. That they exercised due care throughout their ownership or operation of the contaminating facility; and
>
> 4. That they protected against those acts and omissions of the polluting persons, and the consequences of those acts and omissions, that were foreseeable.

See 42 U.S.C. § 9607(b)(3); *see also Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co.*, 14 F.3d 321, 325 (7th Cir.1994).

The district court found that the defendants failed to carry their burden on all four elements of the section (b)(3) defense. My colleagues, in desiring that the district court "revisit its treatment of the defense" raised by the defendants, address only the "contractual relationship" ground. Even if the district court erred in its treatment of that element of the defense, its findings that the defendants have not carried their burden of proving the remaining three elements of the section 107(b)(3) defense, which my [45] colleagues do not question, is amply supported in the record.

The district court committed no clear error in finding that the defendants demonstrated neither the exercise of due care nor the use of appropriate precautions. For example, in a May 1980 environmental risk report covering Aerojet and several subsidiaries including Cordova/Michigan, the defendants repeatedly stated their intent to take a head-in-the-sand approach with respect to the contamination problem:

> The most significant environmental problems associated with the facility are those relating to the residues of past industrial occupants of the site. Management has adopted the position that any injury to others arising out of contamination from these residues is the responsibility of the State of Michigan Department of Natural Resources and that, accordingly, Cordova should insulate itself from any knowledge of, or involvement in monitoring these wastes.

The report went on to acknowledge that waste drums remained buried, despite completion of MDNR's removal efforts. Moreover, the report acknowledged that the stipulation entered into by Cordova and MDNR was never intended to resolve the contamination problem. In describing the responsibilities assumed by the parties under the stipulation, the report admitted that MDNR's duties were limited to removing 8700 drums and a portion of the contaminated soil and sludge, and that the stipulation's hold-harmless clause relieved the defendants only of liability arising out of these specified removal efforts. In addition, as the report acknowledged, the MDNR absolved the defendants of liability relating to procurement of an alternative community water source.

As the district court pointed out, and as the report confirms, the stipulation did not resolve responsibility for the remaining drums and contaminated soil and sludge, as [46] well as responsibility for groundwater contamination. In this regard, the report specifically opined:

> Between 65 and 100 monitoring wells for testing groundwater were either installed by Story or have been installed more recently under a State/Federal study of groundwater contamination at the site. The study is being carried out by several consulting organizations under contract to the state. Cordova management believes the studies show little or no contamination but has avoided any participation or liaison with the study teams . . . . Because of the possibility that Cordova's potential liability for groundwater contamination may have survived the Consent Order, it would appear desirable for Cordova management to keep abreast of current monitoring results. In addition, although a high chloride content would show continuation of problems from the old Story wastes, a high sulphate concentration would indicate seepage problems arising out of Cordova's current operations.

Fully aware that waste drums remained buried beneath the

site and that the majority of the contaminated soil had not been removed, and cognizant of groundwater contamination to which they may have been contributing, the defendants believed the solution to these problems was to don blinders. Their willful blindness can hardly be characterized as the exercise of due care.

For the same reasons, it cannot be said that the defendants took adequate precautions to protect against the consequences of Ott II's and Story's omissions and acts. While the parties, in their briefs, debate whether reimplementation of the purge wells would have been an adequate precaution, they overlook the big picture. The defendants, fully aware that contamination problems on their property were not being addressed, chose to take no precautions to protect against the foreseeable consequences of these problems--namely, further migration. [47]

Accordingly, because the defendants have failed to prove at least two of the requisite elements of the third-party defense, the district court properly held that they were not entitled to invoke it. It is simply unnecessary to consider whether they sustained their burden regarding the remaining two elements, including whether any of the pollution was the act of a third party "in connection with" the contractual relationship with the defendants.

IV.

The judgment of the district court should be affirmed.

Nos. 92-2288/2326

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	AMENDED
Plaintiff-Appellee,	
v.	ORDER
CORDOVA CHEMICAL CO. OF MICHIGAN, ET AL.,	
Defendants-Appellants,	FILED OCT 19 1995
CPC INTERNATIONAL, INC.,	LEONARD GREEN, Clerk
Defendant-Appellee,	
ARNOLD C. OTT, ET AL.,	
Defendants,	
MICHIGAN DEPARTMENT OF NATURAL RESOURCES,	
Defendant-Appellee.	

BEFORE: MERRITT, Chief Judge; KENNEDY, MARTIN, MILBURN, NELSON, RYAN, BOGGS, NORRIS, SUHRHEINRICH, SILER, BATCHELDER, DAUGHTREY, and MOORE, Circuit Judges.

A majority of the Judges of this Court in regular active service have voted for rehearing of this case en banc. Sixth Circuit Rule 14 provides as follows:

> The effect of the granting of a hearing en banc shall be to vacate the previous opinion and judgment of this court, to stay the mandate and to restore the case on the docket sheet as a

pending appeal.

Accordingly, it is **ORDERED** that the previous decision and judgment of this court is vacated, the mandate is stayed and this case is restored to the docket as a pending appeal.

The Clerk will direct the parties to file supplemental briefs and will schedule this case for oral argument as soon as possible.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green, Clerk

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1995 FED App. 0211P (6th Cir.)
File Name: 95a0211p.06

Nos. 92-2288/2326

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

United States of America,
Plaintiff-Appellee,

v.

Cordova Chemical Company of Michigan; Cordova Chemical Company; Aerojet-General Corporation,
Defendants-Appellants (92-2288),
Defendants-Appellees,

CPC International Inc.,
Defendant-Appellee,
Defendant-Appellant (92-2326),

Arnold C. Ott; Commercial Union Insurance Company, et al.,
Defendants,

Michigan Department of Natural Resources,
Defendant-Appellee.

On Appeal from the United States District Court for the Western District of Michigan

[2]

Decided and Filed July 14, 1995

Before: CELEBREZZE, RYAN, and NORRIS, Circuit Judges.

NORRIS, J., delivered the opinion of the court, in which CELEBREZZE, J., joined. RYAN, J. (pp. 19-35), delivered a separate dissenting opinion.

ALAN E. NORRIS, Circuit Judge. This appeal highlights the difficulty that often attends the apportionment of liability for clean-up costs of sites that have been subjected to long-term environmental degradation. In the present case, brought pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9674 (1988 & Supp. V 1993), the environmental damage occurred over a period of decades and during the watch of several owners.

A central concern on appeal is the criteria required under CERCLA before a parent corporation can be held financially liable for pollution that occurred during the ownership of a subsidiary. Because we adopt a stricter standard than did the district court for imposition of such liability, we reverse certain of its determinations and remand for further proceedings.

I. PROCEEDINGS BELOW

In May and June 1991, the district court conducted a fifteen-day bench trial to determine which parties were responsible for clean-up costs related to pollution of a site located in Dalton Township, Michigan. In addition to the live testimony of twenty-nine witnesses, the court received more than 2,300 exhibits and reviewed dozens of deposition transcripts. Given the complexity of the [3] proceedings below, the factual findings contained in the district court's published opinion are extensive. *CPC Int'l, Inc. v. Aerojet-General Corp.*, 777 F. Supp. 549, 555-70 (W.D. Mich. 1991). We summarize them here by way of background.

Beginning in 1957, a series of owners used the Dalton Township site to manufacture chemicals. The initial owner, the Ott Chemical Company ("Ott I"), controlled the site from 1957 until 1965. During this time, the groundwater flowing underneath the site became contaminated, a development

confirmed by tests conducted in 1964.

Pollution of soil, surface water, and groundwater continued after the Ott Chemical Company ("Ott II"), a wholly owned subsidiary of CPC International, Inc. ("CPC"), took over ownership of the site in 1965. The use of unlined lagoons as a means of chemical waste disposal was the principal cause of the contamination. According to the district court, this practice spanned the period from 1959 until at least 1968.

Seepage from these lagoons did not, however, constitute the sole source of pollution that occurred during the ownership of Ott I and Ott II. Further contamination emanated from chemical spills from train cars, from chemical drums, from overflows of chemicals contained in a cement-lined equalization basin, and from other sources. Groundwater pollution did not go completely untreated during this time; from 1965 until 1974, purge wells were operated intermittently in an attempt to alleviate the problem.

In 1972, the Story Chemical Company ("Story") acquired the site from Ott II and continued to operate it until 1977, when bankruptcy ended operations. At that point, a trustee in bankruptcy assumed title to the site and attempted to find a buyer.[4]

Active governmental response to the pollution problems at the site began in 1977, after Story's bankruptcy, when the Michigan Department of Natural Resources ("MDNR") visited the site to assess the situation. In view of the severity of the environmental problems and the lack of resources to pay for a cleanup, the MDNR became active in efforts to attract a purchaser who would participate financially in clean-up efforts. This search led to the signing of a document on October 13, 1977, by the Cordova Chemical Company ("Cordova/California"), a wholly owned subsidiary of Aerojet-General Corporation ("Aerojet"), and the MDNR. The district court described the agreement and its aftermath:

> It addressed the problem of environmental contamination at the property and set forth obligations with respect to cleanup activities
> . . . .

. . . .

. . . MDNR agreed to remedy the waste container and sludge problems, and Cordova/California agreed to eliminate the phosgene gas and give MDNR $600,000 to defray the costs of the agency's cleanup of the waste containers, sludge and residential wells.

. . . .

With respect to Cordova/California's $600,000 payment and the company's responsibility or liability for the contamination at the site it was acquiring, the [agreement] stated:

. . . .

> Cordova Chemical Company shall not have any responsibility or liability in connection with any other corrective actions which the Department of Natural Resources or any other governmental agency may hereafter deem necessary . . . .[5]

. . . .

However, the agreement did not provide for a total cleanup of the site's severe environmental problems. . . .

In particular, MDNR and Cordova/California did not reach an agreement regarding a remedy for the groundwater contamination problem. Instead, the fate of the ground-water problems was not resolved, with MDNR left to tackle the problem as part of its overall regulatory responsibility for the site.

. . . .

. . . Cordova/California and MDNR fulfilled their cleanup obligations under the

[agreement] . . . .

CPC Int'l v. Aerojet-General, 777 F. Supp. at 564-67.

Having executed this document, Cordova/California purchased the site the following day from the Story bankruptcy trustee. Cordova Chemical Company of Michigan ("Cordova/Michigan"), a wholly owned subsidiary of Cordova/California, acquired ownership of the site in 1978. Cordova/Michigan retains ownership, although manufacturing operations at the site ceased in 1986.

The district court made the following observations regarding conditions at the site during the ownership of the Cordova companies:

> During their period of operations, [the companies] neither buried waste nor dumped it onto the ground. No chemical waste was disposed into the unlined lagoons that had been used during the Ott I and Ott II eras. Before beginning chemical manufacturing, Cordova/Michigan [6] repaired the equalization basin and chemical sewer system. When operating, Cordova/Michigan discharged chemical waste through off-site disposal or to a sewer that flowed to the Muskegon County treatment facility.

Id. at 556. In short, although the preexisting groundwater contamination problem was not remedied during their ownership, the trial court concluded that neither Cordova/California nor Cordova/Michigan exacerbated the condition.[1]

The federal Environmental Protection Agency became involved in cleanup of the site in 1981. Since then, the EPA has formulated a long-term response to the environmental damage that has occurred at the site; the cost of this effort will run into the millions of dollars.

II. CERCLA LIABILITY

Section 107(a) of CERCLA lists the parties who are potentially liable for the clean-up costs of a polluted site.[2] [7] 42 U.S.C. § 9607(a). For the purposes of this action, those parties include the present owner *and* operator of a facility from which there is a release of a hazardous substance, any prior owner *or* operator of a facility whose involvement coincided with disposal of a hazardous substance, and any person who arranged for the disposal or transport of hazardous waste from a facility. 42 U.S.C. § 9607(a)(1)-(3). The parties stipulated that the site is a "facility" as defined by CERCLA, that it contains "hazardous substances," that "releases" of hazardous substances have occurred and threaten to continue, and that CPC, the MDNR, Aerojet, Cordova/California, and Cordova/Michigan are "persons" as defined by the statute. *Id.* at 556.

Because courts that have been asked to render liability decisions in CERCLA actions frequently invoke the remedial purpose of the act, *e.g., United States v. Kayser-Roth Corp., Inc.*, 910 F.2d 24, 26 (1st Cir. 1990), *cert. denied*, 498 U.S. 1084 (1991), we will review that subject [8] before considering the liability of those parties now before us.

Congress did enact CERCLA as a "remedial statute designed to protect and preserve public health and the environment." *Kayser-Roth*, 910 F.2d at 26; *accord Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1221 (3d Cir. 1993); *Anspec Co., Inc. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1241-42 (6th Cir. 1991) (reviewing this circuit's approach to CERCLA liability). Accordingly, courts generally will not interpret § 9607(a) in a way that apparently frustrates the statute's goals in the absence of specific congressional intent otherwise. *Anspec*, 922 F.2d at 1247 (citing *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1045 (2d Cir. 1985)).

It must be recognized, however, that it is difficult to divine the specific, as opposed to the general, goals of Congress with respect to CERCLA liability since the statute represents an eleventh hour compromise. *See generally Shore Realty Corp.*, 759 F.2d at 1039-42 (discussing legislative

history). As the district court recognized, "some of CERCLA's provisions are vague and its legislative history sparse." *CPC Int'l v. Aerojet-General*, 777 F. Supp. at 571; *accord Anspec*, 922 F.2d at 1247 (characterizing the legislative history as "scant"); *Lansford-Coaldale Joint Water Auth.*, 4 F.3d at 1221 ("[C]ongressional intent may be particularly difficult to discern with precision in CERCLA, a statute notorious for its lack of clarity and poor draftsmanship.").

Courts would not be warranted, therefore, in pointing to the "remedial legislation" litany, *see generally* Norman J. Singer, 3 Sutherland Statutory Construction § 60.01 (5th ed. 1992) (the rule that remedial statutes should be liberally construed is "firmly established"); *Dennis v. Higgins*, 498 U.S. 439, 443 (1991) (noting that 42 U.S.C. § 1983, as a remedial statue, should be liberally construed), as a means for filling in the blanks so as to discern a congressional intent to impose liability under nearly every conceivable [9] scenario. Thus, while the liability provisions concerning facility operators should be construed so that financial responsibility for clean-up operations falls upon those entities who contributed to the environmental problem, the widest net possible ought not be cast in order to snare those who are either innocently or tangentially tied to the facility at issue. In fact, this court has said, "Congress intended that those responsible for disposal of chemical poisons bear the cost and responsibility for remedying the harmful conditions *they created*." *Anspec*, 922 F.2d at 1247 (emphasis added).

In turning to the specific facts now before us, we adhere to the tenet that liability attaches only to those parties who are culpable in the sense that they, by some realistic measure, helped to create the harmful conditions.

In its effort to discern the sweep of CERCLA liability, the district court concluded that:

> CERCLA broadens the potential for liability of parent corporations without discarding entirely the traditional concept of limited liability that is central to corporate law. . . .

> Accordingly, it seems that CERCLA's "owned or operated" language forges a *new, middle ground*. It is a ground that at once accommodates the general principle of limited liability and the broader principle of liability attaching for operative activity. To permit these principles to coexist under CERCLA, the liability of a parent corporation cannot attach simply because a parent has had involvement with its subsidiary in a manner merely consistent with their investment relation-ship. Rather, a parent must have actually operated the business of its subsidiary.
>
> In this court's view, then, a parent corporation is directly liable under section 107(a)(2) as an operator only when it has exerted power or [10] influence over its subsidiary by actively participating in and exercising control over the subsidiary's business during a period of disposal of hazardous waste. A parent's actual participation in and control over a subsidiary's functions and decision-making creates "operator" liability under CERCLA; a parent's mere oversight of a subsidiary's business in a manner appropriate and consistent with the investment relationship between a parent and its wholly owned subsidiary does not.

CPC Int'l v. Aerojet-General, 777 F. Supp. at 573 (emphasis added).

On the basis of this "new, middle ground," the district court found both CPC and Aerojet liable as operators for the disposal of hazardous substances that occurred while their subsidiaries operated the site.

III. DISCUSSION

A. CPC

The district court reasoned that liability potentially

could attach to CPC as a parent corporation in two ways: direct liability under CERCLA's "operator" language or by common law veil-piercing. It determined that CPC was liable as an operator of the site for environmental damage that occurred during the ownership of Ott II; this liability was grounded in section 107(a)(2) of CERCLA, which renders "any person [liable] who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." 42 U.S.C. § 9607(a)(2). To reach this conclusion, the court had to find CPC, as a parent corporation, responsible for the conduct of its wholly owned subsidiary corporation, Ott II. Because the court held CPC directly liable as an operator, it did not reach the question of whether CPC was vicariously liable through the traditional common law theory of veil-piercing.[11]

It is not at all clear from the district court's opinion whether the standard for finding parental liability under its "new, middle ground" is the actual operation of the subsidiary's business or, on the other hand, the exertion of power or influence through active participation in the subsidiary's business. Although they are used interchangeably in the district court's opinion, the two concepts are not interchangeable. In fact, the facts recited by the district court appear to support liability under the latter standard but not under the former. This confusion underscores the inevitable difficulty that arises when courts attempt to erect new concepts of corporate liability within the framework of CERCLA in the absence of direction from Congress. We are not persuaded that, in enacting CERCLA, Congress contemplated the abandonment of traditional concepts of limited liability associated with the corporate form in favor of a "new, middle ground."

CERCLA defines the "owner or operator" of an onshore facility as "any person owning or operating such facility." 42 U.S.C. § 9601(20)(A)(ii). When the facility has been conveyed to a unit of state or local government, the definition differs. It then includes "any person who owned, operated or otherwise controlled activities at such facility immediately [before the transfer to the governmental authority]." 42 U.S.C. § 9601(20)(A)(iii). It thus appears that the drafters of the statute distinguished an operator from a person who

"otherwise controlled" a facility. When the owner of a facility contracts out the daily running of the operation to a third party, that party presumably attains operator status (and its attendant liability). However, when a parent corporation actively participates in the affairs of its subsidiary consistent with the restrictions imposed by traditional corporate law, nothing in the definition just cited or in the rest of the statute indicates that the parent has assumed the role of operator.

Despite the definition of "owner or operator," several circuits and the district court below have determined that parent corporations can attain operator status by exerting [12] significant control over the operations of their subsidiaries. *See, e.g., Kayser-Roth*, 910 F.2d at 26-27; *Lansford-Coaldale Joint Water Auth.*, 4 F.3d at 1221; *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 842 (4th Cir), *cert. denied*, 113 S. Ct. 377 (1992); *CPC Int'l v. Aerojet-General*, 777 F. Supp. at 572-73.

While we understand the district court's desire to extend the reach of CERCLA so that its remedial purpose is given maximum impact, the "new, middle ground" threatens to sweep away the protections long afforded by the corporate form with respect to limited liability. In our view, nothing in the statute or its legislative history supports such a reading. As the fifth circuit has noted in this context, "[i]f Congress wanted to extend liability to parent corporations it could have done so, and it remains free to do so." *Joslyn Mfg. Co. v. T.L. James & Co., Inc.*, 893 F.2d 80, 83 (5th Cir. 1990).

The district court's approach presents a number of problems. First, it replaces the relatively bright line provided by the doctrine of piercing the corporate veil, which typically requires a fraudulent purpose, with a nebulous "control" test. When, precisely, is a parent acting in a manner consistent with its investment relationship as opposed to a manner that triggers operator liability? The indicia enumerated by the district court, such as participation in the subsidiary's board of directors and involvement in specific policy decisions, offer little guidance. Certainly, these activities are not grounds traditionally relied upon to pierce the corporate veil.

Second, the threat of unlimited liability will likely deter

private sector participation in the cleanup of existing sites. The case before us illustrates this point. There is no dispute that the MDNR actively sought a private sector partner to take over and assist in the remediation of the site. Aerojet indicated an interest on the condition that it could cap its potential liability for environmental cleanup, which it sought to accomplish through the negotiation of [13] the agreement with the MDNR and the use of subsidiaries. To scuttle such sensible and legitimate precautions in favor of an unpredictable "control" test would actually contravene the public interest by discouraging businesses from becoming involved in such projects.[3]

In view of its flaws, we reject the district court's "new, middle ground" for defining liability. We conclude that a parent corporation incurs operator liability pursuant to section 107(a)(2) of CERCLA, for the conduct of its subsidiary corporation, only when the requirements necessary to pierce the corporate veil are met.

In determining whether the circumstances in this case warrant a piercing of the corporate veil in order to disregard the separateness of the corporate entities, we look to state law. *See Anspec*, 922 F.2d at 1248. Michigan appears to follow the general rule that at least two definitive requirements must be met in order to pierce the corporate veil. First, there must be such a unity of interest and ownership that the separate personalities of the corporation and its owner cease to exist; second, the circumstances must be such that adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice. 1 William M. Fletcher, Fletcher Cyclopedia of the Law of Private Corporations § 41.30 (perm. ed. rev. vol. 1990); Stephen H. Schulman et al., Michigan Corporation Law & Practice § 3.9(c) (1991 Supp.); *see also Bodenhamer Bldg. Corp. v. Architectural Research Corp.*, 873 F.2d 109, 111-12 (6th Cir. 1989) (citing cases). Organization of a corporation for the avowed purpose of avoiding personal responsibility does not in itself constitute fraud or reprehensible conduct justifying a disregard of the corporate form. *Gledhill v.* [14] *Fisher & Co.*, 272 Mich. 353, 359, 262 N.W. 371, 373 (Mich. 1935).

The district court relied upon the following factors in

determining that CPC was an "active operator" of its subsidiary and therefore directly liable under section 107(a)(2): 100% ownership of Ott II; participation on Ott II's board of directors; a cross-pollination of officers who were involved in decision-making and daily operations; active participation by CPC officials in environmental matters; and financial control of Ott II through approval of budgets and capital expenditures. *CPC Int'l v. Aerojet-General*, 777 F. Supp. at 575. While these factors reveal a parent that took an active interest in the affairs of its subsidiary, none of them indicate that CPC utilized the corporate form to perpetrate a "fraud or wrong" as required before a court can pierce the veil.

Accordingly, the district court's finding of liability with respect to CPC must be reversed.

B. MDNR Liability

The district court rejected liability claims that were advanced against the MDNR on two fronts: as an operator and as an "arranger." Only the district court's decision regarding arranger liability is appealed.

Section 107(a)(3) of CERCLA imposes liability on:

> any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility . . . owned or operated by another party or entity and containing such hazardous substances.

42 U.S.C. § 9607(a)(3).[15]

It is contended that the MDNR incurred arranger liability when it negotiated with Cordova/California for the acquisition of the site and agreed with Cordova/California on a plan to clean up the groundwater contamination.

We agree with the district court's conclusion that the MDNR escapes liability because its actions were taken in

response to an environmental emergency as provided in section 107(d)(2):

> No state or local government shall be liable under this subchapter for costs or damages as a result of actions taken in response to an emergency created by the release or threatened release of a hazardous substance generated by or from a facility owned by another person. This paragraph shall not preclude liability for costs or damages as a result of gross negligence or intentional misconduct by the State or local government. For the purpose of the preceding sentence, reckless, willful, or wanton misconduct shall constitute gross negligence.

42 U.S.C. § 9607(d)(2). Our reading of the record indicates that the MDNR acted in good faith when attempting to address the groundwater contamination of the site. That its efforts proved to be less than entirely successful is unfortunate, but does not subject the agency to liability.

C. *Liability of Aerojet and its Subsidiaries*

1. *Owner Liability*

The district court held both Aerojet and Cordova/Michigan liable as present owners of the site under section 107(a)(1) which assigns liability to "the owner and operator of a vessel or a facility." 42 U.S.C. § 9607(a)(1). Cordova/Michigan does not challenge this decision on appeal and we therefore express no opinion with respect to its liability.[16]

As to the parent corporation, the district court appropriately looked to Michigan law in determining whether to pierce the corporate veil. The court, however, misapplied that law. The court determined that Aerojet had "totally dominated Cordova/Michigan, creating a complete identity of interests between the parent and its wholly owned subsidiary." *CPC Int'l v. Aerojet-General*, 777 F. Supp. at 578. Accordingly, the court determined that it was appropriate to pierce the corporate veil and impose vicarious liability. Among the grounds cited for its decision, the court highlighted

the total ownership by the parent, Aerojet's active participation in the acquisition of the site, the timing of the incorporation of the subsidiaries, cross-pollination of corporate officers, financial control, and the integration of the businesses. *Id.* at 577.

These actions, however, do not approach the level of culpable conduct necessary to pierce the corporate veil under Michigan law. *Bodenhamer Bldg. Corp.*, 873 F.2d at 112. While Aerojet obviously sought to limit its liability for existing environmental problems through good faith negotiation with the MDNR and prudent use of the corporate form, there is nothing to suggest that the company acted with fraudulent intent or otherwise sought to distort the legitimate purposes of the corporate forms. Although Aerojet took an active interest in its subsidiaries, we are not persuaded that Cordova/Michigan was anything but a viable corporate entity. Accordingly, the district court erred when it pierced the corporate veil to assign liability to Aerojet as an owner.

The district court also noted that Cordova/California actually owned the site from October 1977 until November 1978. Although the company began clean-up operations as required by its agreement with the MDNR, the district court found that additional releases of hazardous substances occurred during this period. *CPC Int'l v. Aerojet-General*, 777 F. Supp. at 579. It thus imposed liability on Cordova/California as a former owner pursuant to section 107(a)(2).[17]

This conclusion, however, conflicts with the district court's summary of activity at the site during the ownership of the Cordova companies. *Id.* at 556. On remand, therefore, we ask the district court to indicate with greater specificity precisely which portions of the record it relies upon to support a finding that additional releases of hazardous substances occurred during Cordova/California's brief ownership. Absent such evidence, liability will not attach to Cordova/California as a former owner of the site.

2. *Operator Liability*

Finally, we turn to the district court's alternative

imposition of liability on Aerojet pursuant to section 107(a)(2), precisely the same basis for liability that we have already discussed, and rejected, with respect to CPC. Since we reject the "control" test, no liability attaches unless the corporate veil can be pierced. We therefore conclude that Aerojet cannot be held liable as an operator pursuant to section 107(a)(2).

3. *Defenses*

Upon remand, the district court should also revisit its treatment of the defense raised by Aerojet, Cordova/California, and Cordova/Michigan under section 107(b)(3). The pertinent part of the statute follows:

> [A] person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were *caused* solely by--
>
> . . . .
>
> (3) an act or omission of a third party other than . . . one whose act or omission occurs *in connection with* a contractual relationship, existing directly or indirectly, with the defendant . . . if the defendant establishes by a [18] preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, . . . and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions . . . .

42 U.S.C. § 9607 (b) (emphasis added).

In parsing the exceptions to the defense, the district court noted that under 42 U.S.C. § 9601(35)(A), the term "contractual relationship" includes deeds transferring title. Thus, the district court concluded that a defense would be

unavailable to a defendant who had a direct or indirect contractual relationship with the parties responsible for contaminating the site. *CPC Int'l v. Aerojet-General*, 777 F. Supp. at 581. Under this view, the defense could not be invoked by any defendant who was a party to a deed with a polluter. The district court, however, ignored the requirement that, in order to render the defense inapplicable, the hazardous substance release must have resulted from the act of a third party "in connection with" the contractual relationship with the defendant. The "in connection with" language of the defense appears to have been designed to preclude a person from escaping liability by contracting for a third party to do his dirty work for him.

As we pointed out above, from what we glean from the district court's recitation of facts, the release of hazardous substances appears to have been *caused* solely by the predecessors of these three defendants.

IV. CONCLUSION

For the foregoing reasons, the district court is **reversed** in part and **affirmed** in part and this cause is **remanded** to the district court for further proceedings consistent with this opinion.

[1]The district court noted that two hazardous chemicals -- benzene and 1,2 dichloroethane -- were found at the site and used during the Cordova period of ownership. *Id.* at 556, 579 n.11. Although Cordova/Michigan, in an April 5, 1984, letter to the federal EPA, acknowledges generating small quantities of these materials for disposal, we find nothing in the record to support a finding that any additional release of hazardous substances occurred at the site during the Cordova period.

[2]42 U.S.C. § 9607(a) states, in part:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section--
>
> (1) the owner and operator of a . . . facility,

> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment of hazardous substances . . .
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, . . . from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for--
>
> (A) all costs of removal or remedial action... .

[3]Although it does not affect our resolution of the liability issue, we note in passing that these negotiations occurred before the enactment of CERCLA.

[19]RYAN, Circuit Judge, dissenting. The court's opinion today rests primarily on three grounds:

- That a parent corporation cannot, as a matter of law, be held directly liable under 42 U.S.C. § 9607(a)(2) as an "operator" of a facility owned and ostensibly operated by its subsidiary corporation, but may face *only* vicarious liability under state law corporation veil piercing principles;

- That piercing the corporate veil under Michigan law requires circumstances showing that the corporate form was used for a "fraudulent purpose."

- That the district court erred in finding that the defendants failed to prove their entitlement to the so-called third-party defense under 42 U.S.C. § 9607(b)(3).

In my judgment, the court is mistaken on all three grounds, and I therefore respectfully dissent.

I.
Direct Liability of a Parent Corporation under § 9607(a)(2)

Nothing in CERCLA, 42 U.S.C.§ 9601 *et seq.*, excludes a parent corporation, as a matter of law, from liability for operating a contaminating facility if, in fact, it is operating it. CERCLA identifies the individuals and entities that may be held directly liable as responsible parties, and they include, as relevant here:

> (1) the owner and operator of a . . . facility, [and]
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any [20] facility at which such hazardous substances were disposed of.

42 U.S.C. § 9607(a)(1), (2).

CERCLA defines "owner or operator" as "*any person*

owning or operating such facility," § 9601(20)(A) (emphasis added), and excludes from the definition "a person, who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest in the . . . facility," *id.* The next subsection defines "person" to include a corporation. § 9601(21).

The district court came to the conclusion, as I do, that a parent corporation may face potential liability as an operator of a contaminating facility because the plain language of § 9607(a)(2) indicates that Congress intended to impose liability on *any* entity actually operating a facility, regardless of the nature of the entity's ostensible interest in the facility. Nothing in the language of § 9607 or elsewhere in CERCLA suggests that Congress's definitions of "operator" or "person" include any corporation except a parent corporation.

The majority opinion holds, however, that Congress indeed intended to exclude parent corporations from potential direct liability as facility operators because Congress did not "contemplat[e] the abandonment of traditional concepts of limited liability associated with the corporate form." Maj. op. at 11. But that conclusion seems to me to beg the question. The question under subsection (a)(2) is not whether a parent corporation may be held vicariously liable for abuse of its subsidiary's corporate form--clearly it may--but whether Congress has created direct liability if the facts show that the parent corporation was the actor actually operating a contaminating facility. Stated differently, the issue is whether Congress has excused a parent corporation who is in fact operating a contaminating facility from direct [21] liability, if it is doing so in the name of a corporate subsidiary. The district court thinks not, and I agree.

The district court held that a parent corporation may be held directly liable under § 9607(a)(2) as an operator if its level of control over the subsidiary is so complete and pervasive as to exceed mere oversight:

> In this court's view, then, a parent corporation is directly liable under section 107(a)(2) as an operator only when it has exerted power or influence over its subsidiary

> by actively participating in and exercising control over the subsidiary's business during a period of disposal of hazardous waste. A parent's actual participation in and control over a subsidiary's functions and decision-making creates "operator" liability under CERCLA; a parent's mere oversight of a subsidiary's business in a manner appropriate and consistent with the investment relationship between a parent and its wholly owned subsidiary does not.

CPC Int'l, Inc. v. Aerojet-General Corp., 777 F. Supp. 549, 573 (W.D. Mich. 1991).

The question is simply one of fact. The parent corporation is liable if it is shown to have been the operator-in-fact of the facility as indicated by the extent of its domination and control of its subsidiary--the ostensible operator. In such circumstances, there is no issue of veil piercing at all; it is a matter of applying the language of § 9607(a)(2). As the district court pointed out, some of the factors relevant to deciding whether the parent is the operator-in-fact include considerations such as the parent corporation's involvement in the subsidiary's board of directors and daily operations, and the parent corporation's control over the subsidiary's policy making in areas such as personnel, finance, and waste disposal. Also relevant are the facts leading up to the subsidiary's origin and the reasons for its existence, and the parent's level of financial [22] monitoring and its cooperation or consolidation with the subsidiary's accounting, legal, and research functions.

At least three other circuits have held that a parent corporation may be held directly liable as an operator under § 9607(a)(2) without any consideration of corporate veil piercing. In *United States v. Kayser-Roth Corp.*, 910 F.2d 24 (1st Cir. 1990), *cert. denied*, 498 U.S. 1084 (1991), the court declared that the plain language of CERCLA compelled the conclusion that parent corporations may be held directly liable under § 9607(a)(2):

> Congress, by including a liability category in

> addition to owner ("operators") connected by the conjunction "or," implied that a person who is an operator of a facility is not protected from liability by the legal structure of ownership. Given this grammatical construction and the broad definition of "person," corporate status, while relevant to determine ownership, cannot shield a person from operator liability. In addition, the legislative history provides no indication that Congress intended "all persons" who are "operators" to exclude parent corporations. . . . Thus, our analysis of the statute and its legislative purpose and history reveals no reason why a parent corporation cannot be held liable as an operator under CERCLA.

Id. at 26 (citation omitted).

And, "[t]o be an operator requires more than merely complete ownership and the concomitant general authority or ability to control that comes with ownership. At a minimum it requires active involvement in the activities of the subsidiary." *Id.* at 27.

In *Lansford-Coaldale Joint Water Authority v. Tonolli Corp.*, 4 F.3d 1209 (3d Cir. 1993), the court embraced the *Kayser-Roth* standard, emphasizing that "operator liability may be established even without evidence that a [parent] [23] corporation controlled the environmental decisions of an affiliated corporation as long as there exist other factors which sufficiently demonstrate pervasive control." *Id.* at 1222 n.13.

Similarly, in *Jacksonville Electric Authority v. Bernuth Corp.*, 996 F.2d 1107 (11th Cir. 1993), the court agreed that the test for parent corporation liability as an operator was whether the parent "'exercises actual and pervasive control of the subsidiary to the extent of actually involving itself in the daily operations of the subsidiary. Actual involvement in decisions regarding the disposal of hazardous substances is a sufficient, but not a necessary, condition to the imposition of operator liability.'" *Id.* at 1110 (quoting *Jacksonville Elec. Auth. v. Eppinger and Russell Co.*, 776 F. Supp. 1542, 1547-48 (M.D.

Fla. 1991)).

Two other circuits apparently would hold a parent corporation directly liable as an operator not because the parent corporation actually controlled the subsidiary, but rather because it had the authority to do so. In *Nurad, Inc. v. William E. Hooper & Sons*, 966 F.2d 837 (4th Cir.), *cert. denied*, 113 S. Ct. 377 (1992), the Fourth Circuit held that the key inquiry is not whether the parent corporation actually controlled the subsidiary, but rather whether it had the "'*authority* to control the operations or decisions involving the disposal of hazardous substances at the [s]ite.'" *Id.* at 842 (emphasis in original). In *dicta*, the Ninth Circuit also has identified "authority to control the cause of the contamination" as the standard. *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1341 (9th Cir. 1992).

In addition, the Tenth Circuit, in *FMC Corp. v. Aero Industries, Inc.*, 998 F.2d 842 (10th Cir. 1993), applied the *Kayser-Roth* standard to impose operator liability on a company director directly, and not under state corporation law veil piercing standards.[24]

Although I would not go so far as to hold, as the Fourth and the Ninth Circuits would, that mere "authority to control" is sufficient, it is clear that all the circuits that have addressed the point, save one, have found that a parent corporation is exposed to direct liability under § 9607(a)(2) without regard to common law veil piercing.

Only the Fifth Circuit has adopted a narrower view of operator liability for parent corporations: "CERCLA does not define 'owners' or 'operators' as including the parent company of offending wholly-owned subsidiaries. Nor does the legislative history indicate that Congress intended to alter so substantially a basic tenet of corporation law." *Joslyn Mfg. Co. v. T.L. James & Co.*, 893 F.2d 80, 82 (5th Cir. 1990), *cert. denied*, 498 U.S. 1108 (1991). However, another panel of the same court recently observed, in *dicta*, that an individual shareholder or officer could be held directly liable as an operator:

> Under traditional concepts of corporate

> law, the principle of limited liability would protect officers or employees like [the shareholder here] from being held responsible for the acts of a valid corporation. However, CERCLA prevents individuals from hiding behind the corporate shield when, as "operators," they themselves actually participate in the wrongful conduct prohibited by the Act. . . . In such cases, a defendant can be held individually liable for his wrongful conduct. "[T]his personal liability is distinct from the derivative liability that results from 'piercing the corporate veil'" where we would hold the owners of a less than bona fide corporation responsible for corporate acts.

Riverside Mkt. Dev. Corp. v. International Bldg. Prods., Inc., 931 F.2d 327, 330 (5th Cir.), *cert. denied*, 502 U.S. 1004 (1991).[25]

I conclude, as the district court did, and as the First, Third, Tenth, and Eleventh Circuits have, that a parent corporation may be held directly liable as an operator of a contaminating facility under § 9607(a)(2) if the facts of the case show that its domination and control of the subsidiary corporation ostensibly operating the facility is so pervasive that the parent is the operator in fact.

II.

CPC's Liability under § 9607(a)(2)

The district court found that CPC, Ott II's parent corporation, so totally and completely controlled Ott II that CPC was the actual operator of the contaminating facility in Dalton Township, Michigan, and is therefore directly liable under § 9607(a)(2) as the operator of the site. I agree.

The facts, as found by the district court, are these:

From CPC's acquisition of Ott II in October 1965 through April 1966, all four directors on Ott II's board were CPC officers. Over the next three and one-half years, at least three of the eight board members were officers of CPC, and for the

following two and one-half years, until CPC sold Ott II, CPC officials comprised the majority of the eleven-director board. At all times during Ott II's existence, the chairman of its board was a high-level CPC executive, appointed by CPC's president.

In addition, the managers of Ott II who exerted active control over the subsidiary's day-to-day activities also were officers of CPC. Arnold Ott, who had been chief executive officer of Ott I, continued as Ott II's chief executive officer until 1969, during which time he also was CPC's vice president for scientific research and president of CPC's development company, a subsidiary with oversight responsibility for several CPC subsidiaries including Ott II. In addition, James Eiszner, who had been Ott I's vice president of marketing, served as Ott II's [26] president from 1967 to 1970. During Eiszner's tenure with Ott II, he also served as vice president of CPC's development company, and eventually became CPC's chief executive officer. Moreover, Eiszner, in particular, was criticized during his tenure as an Ott II official for paying too much attention to his CPC responsibilities and not enough attention to Ott II. Beverly Warner served as Ott II's chief executive officer from 1970 until it was sold in 1972, at the same time serving as president of CPC's development company.

In addition to CPC's participation through Ott II's board in Ott II's environmental matters, CPC's environmental affairs director, G.R.D. Williams, was influential in setting Ott II's environmental policies. For example, because Williams did not believe Ott II needed a biological waste treatment facility, Ott II officers abandoned presenting plans for such a facility at a meeting with the state of Michigan. In addition, Williams repeatedly controlled the interface between Ott II officials and state and federal regulators, and instructed Ott II's officers "to consult with CPC before responding to regulatory questionnaires or other inquiries." 777 F. Supp. at 561.

Finally, as the district court found, CPC's involvement in Ott II's financial affairs involved more than mere review and oversight. For example, CPC made loans to Ott II in excess of $5 million, while assuming many of Ott II's existing loans. In addition, CPC commingled its funds with Ott II's funds. CPC

also limited the amount of capital expenditures that Ott II could approve without further approval by CPC's board of directors. As to personnel matters, CPC repeatedly participated in Ott II's labor negotiations with local unions.

Based on these and many other findings, the district court concluded that, "[t]he evidence shows a level of participation and control by CPC that exceeds the bounds of an interested investor and enters the realm of an active operator." *Id.* at 575. These findings are amply supported in the record. Accordingly, the district court's conclusion that CPC was directly liable under § 9607(a)(2) as an operator should be affirmed.

III.

Aerojet's Liability under § 9607(a)(1)

The district court found Aerojet liable as a present "owner" of a contaminated facility under § 9607(a)(1). It did so after finding that the facts justified piercing the corporate veil that thinly shielded Cordova/Michigan from Aerojet.

The majority opinion holds that the district court erred because it misapplied Michigan law: "[The district court's findings do] not suggest that Aerojet operated with a fraudulent purpose; such a fraudulent purpose is, as we read Michigan corporate law, a prerequisite to disregard of the corporate form." Maj. op. at 16 (citing *Bodenhamer Bldg. Corp. v. Architectural Research Corp.*, 873 F.2d 109, 113 (6th Cir. 1989)).

While there is no question that fraud justifies piercing the corporate veil, there is ample authority under Michigan law for finding parent corporation liability through veil piercing for less egregious unjustified use of the corporate form.

The Michigan Supreme Court repeatedly has held that veil piercing is not limited to instances of fraud or illegality. In *People ex rel. Potter v. Michigan Bell Telephone Co.*, 224 N.W. 438 (Mich. 1929), the court disregarded the corporate form despite recognizing that "[f]raud [wa]s expressly disclaimed." *Id.* at 439. In *Herman v. Mobile Homes Corp.*, 26 N.W.2d 757

(Mich. 1947), the court held that when a parent corporation's control of its limited purpose subsidiary is so complete as to result in the subsidiary being a "mere instrumentalit[y]," piercing is appropriate to avoid an injustice, even in the absence of fraud. *Id.* at 762-63. [28]

More recently, the Michigan court affirmed that equity alone may require setting aside the corporate form. In *Wells v. Firestone Tire and Rubber Co.*, 364 N.W.2d 670 (Mich. 1984), a plaintiff attempted to avoid the workers compensation exclusivity provision in Michigan law by bringing a tort action against the employer's parent corporation. The court rejected the attempt, invoking the piercing doctrine to find that the parent and employing subsidiary were a single corporate entity. As the court noted, the injustice to be avoided was abrogation of an overriding public policy interest.

> Our disregard of the separate corporate entities of Firestone and its wholly owned subsidiary is premised upon our recognition of the important public policies underlying the Michigan Worker's Disability Compensation Act and our belief that a contrary determination would be inequitable under the facts of this case. . . .
>
> If the statute is to be construed liberally when an employee seeks benefits, it should not be construed differently when the employer asserts it as a defense to a tort action brought by the employee who claimed and accepted benefits arising from that employment relationship. . . . Indeed, under the facts and circumstances of this case, we would not have permitted Firestone to shield itself behind its wholly owned subsidiary in order to avoid payment of workers' compensation benefits to plaintiff.

Id. at 675. The *Wells* court did not require proof of a "fraudulent purpose."

Indeed, this court has observed, in *dicta* to be sure, that

Michigan law permits veil piercing upon a showing of *any* of the following:

> (a) a corporation and shareholders have complete identity of interests; (b) the corporation is a mere instrumentality of the shareholders; (c) the corporation is a devise to avoid a legal obligation; *or* (d) the corporation is used to defeat public convenience, justify a wrong, protect fraud or defend a crime.

Bodenhamer Bldg. Corp., 873 F.2d at 112 (emphasis added).

Thus, while there is authority in Michigan for denying veil piercing where fraud is absent, *see Klager v. Robert Meyer Co.*, 329 N.W.2d 721 (Mich. 1982), the weight of authority allows piercing when the shielding corporation is a mere instrumentality and justice requires that it be disregarded.

Here, the district court found that Aerojet was the 100 percent shareholder of Cordova/California who, in turn, was the sole shareholder of Cordova/Michigan. In addition, as the district court found, the boards of directors of Cordova/California and Cordova/Michigan were titular only, not even convening for meetings. At least twenty Aerojet officers simultaneously held the same or nearly identical positions in Cordova/California and Cordova/Michigan. Aerojet so completely controlled the finances of all companies, that neither Cordova/California nor Cordova/Michigan were permitted to maintain separate bank accounts. In addition, there was evidence that Aerojet used Cordova/Michigan by transferring to Cordova/California millions in worthless debt owed to Aerojet by Cordova/Michigan, effectively canceling debt owed by Aerojet to Cordova/California. These findings are supported by the record and are not clearly erroneous. The evidence established that Cordova/Michigan operated as a mere instrumentality of Aerojet.

Even more compelling are the findings of the district court regarding Cordova/Michigan's corporate purpose. When Aerojet began negotiations with MDNR for the Dalton Township property, Aerojet negotiated side-by-side [30] with its then unincorporated division, Cordova. After Aerojet

entered two short-term stipulations with MDNR, and merely eleven days before the sale was concluded, Aerojet incorporated Cordova as a wholly-owned subsidiary. Although Aerojet had initially drafted the stipulation and consent order with MDNR, it was "Cordova Chemical Company" that actually signed the agreement. Then, in November 1978, with the remodeling of the facility complete and manufacturing about to begin, Cordova/California incorporated Cordova/Michigan, transferring to it Cordova/California's ownership of the facility. Despite the supposed separate corporate form of Cordova/Michigan, throughout operations, Aerojet actively participated in negotiations with prospective buyers for the possible sale of the facility. Once Cordova/Michigan ceased operations at the site, it was Aerojet that took responsibility for leasing portions of the site to third parties. Accordingly, it is clear that Aerojet took pains to insulate itself from environmental liability for the situation they knew existed at the site. Aerojet admits as much in their brief:

> By using well-capitalized, non-fraudulent, separate corporate subsidiaries, such as Cordova/California and then Cordova/Michigan, Aerojet could justify an attempt to reclaim and make the waste Site productive without risking all of its corporate assets. A rule of law imposing enormous environmental liability on parent corporations whose subsidiary neither perpetrated a fraud nor contributed to actual contamination would result in contaminated waste sites being permanently abandoned as unproductive, orphan properties, because no rational corporate officer could support a decision to rehabilitate a contaminated site if such liability were unavoidable.

Thus, Aerojet admits that Cordova/Michigan was established solely as a facade, to avoid any legal obligation [31] to pay for further environmental cleanup at the site. Under Michigan law, their admission is sufficient to justify piercing the corporate veil. *See Potter*, 224 N.W. at 440.

As Aerojet points out, it is possible that a refusal to allow a prospective purchaser of a contaminated site to avoid liability will result in a scarcity of willing buyers. Certainly, both EPA and MDNR have a substantial interest in locating conscientious purchasers, who are willing to reclaim environmentally corrupt facilities. However, there is no evidence that the Michigan courts would view this interest as an exception to the state's veil piercing standard, especially in light of the competing interest in imposing environmental cleanup costs on private industry rather than on taxpayers. Congress certainly was not deterred by this argument, given its balancing of interests in favor of imposing liability on new owners. Moreover, Aerojet and the Cordovas are not blameless, as they would have the court believe. The district court found that the entities actively contributed to the contamination and then failed to take remedial action, despite knowledge that contamination was continuing to migrate.

Accordingly, the district court's conclusion that, by piercing the corporate veil, Aerojet may be held liable as an "owner" under 42 U.S.C. § 9607(a)(1) should be affirmed.

I further agree with the district court that Aerojet was directly liable as an operator under § 9607(a)(2):

> In light of the same facts that were probative in concluding Aerojet is liable under section 107(a)(1), the court concludes that Aerojet operated the site through active participation and pervasive control over the businesses of both Cordova/California and Cordova/Michigan.
>
> As with CPC's involvement with Ott II, Aerojet's participation and control over the board, management and decision-making at [32] Cordova/California and Cordova/Michigan shows that the parent operated the facility. Aerojet's conduct toward its subsidiaries extended well beyond the activities that are merely indicative of a parent's general oversight of a wholly owned subsidiary.
>
> Accordingly, the court concludes the [sic]

> Aerojet is directly liable as an operator under section 107(a)(2).

CPC Int'l, Inc., 777 F. Supp. at 580.

IV.

Third Party Defense Under § 9607(b)(3)

I do not agree that the district court should be required, upon remand, to "revisit its treatment of the [third-party] defense raised by Aerojet, Cordova/California and Cordova/Michigan" under § 9607(b)(3).

To succeed under § 9607(b)(3), the defendants are required to prove all four elements of a third party defense which are:

> 1. That they did not contribute to the contamination.
>
> 2. That they were not in a direct or indirect contractual relationship with any person who, in connection with the contractual relationship, caused the contamination.
>
> 3. That they exercised due care throughout their ownership or operation of the contaminating facility.
>
> 4. That they protected against those acts and omissions of the polluting persons, and the consequences of those acts and omissions, that were foreseeable.

See 42 U.S.C. § 9607(b)(3); *see also Ker-McGee Chem. Corp. v. Lefton Iron & Metal Co.*, 14 F.3d 321, 325 (7th Cir. 1994). The district court found that the defendants failed to carry their burden on all four elements of the § (b)(3) defense.

The majority opinion, in ordering that the district court "revisit its treatment of the defense" raised by the defendants, addresses only the "contractual relationship" ground. Even if

the district court erred in its treatment of that element of the defense, its findings that the defendants have not carried their burden of proving the remaining three elements of the § 9607(b)(3) defense, which the majority opinion does not question, is amply supported in the record.

The district court committed no clear error in finding that the defendants demonstrated neither the exercise of due care nor the use of appropriate precautions. For example, in a May 1980 environmental risk report covering Aerojet and several subsidiaries including Cordova/Michigan, the defendants repeatedly stated their intent to take an ostrich approach with respect to the contamination problem:

> The most significant environmental problems associated with the facility are those relating to the residues of past industrial occupants of the site. Management has adopted the position that any injury to others arising out of contamination from these residues is the responsibility of the State of Michigan Department of Natural Resources and that, accordingly, Cordova should insulate itself from any knowledge of, or involvement in monitoring these wastes.

The report went on to acknowledge that waste drums remained buried, despite completion of MDNR's removal efforts. Moreover, the report acknowledged that the stipulation and consent order entered by Cordova and MDNR was never intended to resolve the contamination problem. In describing the responsibilities assumed by the [34] parties under the stipulation and order, the report admitted that MDNR's duties were limited to removing 8700 drums and a portion of the contaminated soil and sludge, and that the consent order's hold harmless clause relieved the defendants only of liability arising out of these specified removal efforts. In addition, as the report acknowledged, the MDNR absolved the defendants of liability relating to procurement of an alternative community water source.

As the district court pointed out, and as the report confirms, the stipulation and order did not resolve

responsibility for remaining drums and contaminated soil and sludge, as well as responsibility for groundwater contamination. In this regard, the report specifically opined:

> Between 65 and 100 monitoring wells for testing groundwater were either installed by Story or have been installed more recently under a State/Federal study of groundwater contamination at the site. The study is being carried out by several consulting organizations under contract to the state. Cordova management believes the studies show little or no contamination but has avoided any participation or liaison with the study teams. . . . Because of the possibility that Cordova's potential liability for groundwater contamination may have survived the Consent Order, it would appear desirable for Cordova management to keep abreast of current monitoring results. In addition, although a high chloride content would show continuation of problems from the old Story wastes, a high sulphate concentration would indicate seepage problems arising out of Cordova's current operations.

Accordingly, fully aware that waste drums remained buried beneath the site and that the majority of the contaminated soil had not been removed, and cognizant of groundwater contamination to which they may have been [35] contributing, the defendants believed the solution to these problems was to wear blinders. Their head-in-the-sand approach can hardly be characterized as the exercise of due care.

For the same reasons, it cannot be said that the defendants took adequate precautions to protect against the consequences of Ott II's and Story's omissions and acts. While the parties, in their briefs, debate whether reimplementation of the purge wells would have been an adequate precaution, they overlook the big picture. The defendants, fully aware that contamination problems on their property were not being addressed, chose to take no precautions to protect against the foreseeable consequences of these problems--namely, further

migration. Accordingly, because the defendants have failed to prove at least two of the requisite elements of the third-party defense, the district court properly held that they were not entitled to invoke it.

Since the defendants were required to prove all four elements of the defense, it is unnecessary to consider whether they sustained their burden regarding the remaining two elements, including whether any of the pollution was the act of a third-party "in connection with" the contractual relationship with the defendants.

V.

I would affirm the judgment of the district court.

UNITED STATES OF AMERICA
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Civil Action No. G89-961-CA
HON. DOUGLAS W. HILLMAN

CORDOVA CHEMICAL COMPANY OF MICHIGAN, CORDOVA CHEMICAL COMPANY, AEROJET-GENERAL CORPORATION, CPC INTERNATIONAL INC., and DR. ARNOLD C. OTT,

Defendants.

and

CPC INTERNATIONAL INC.,

Defendant and Third-Party Plaintiff,

vs.

COMMERCIAL UNION INSURANCE COMPANY, et al,

Third Party Defendants.

_____/

CPC INTERNATIONAL INC.,

Plaintiff,

vs.

Civil Action No. G89-10503-CA

AEROJET-GENERAL CORPORATION, CORDOVA CHEMICAL COMPANY, CORDOVA CHEMICAL COMPANY OF MICHIGAN, and MICHIGAN DEPARTMENT OF NATURAL RESOURCES,

Defendants.

_____/

FINAL JUDGMENT

The Court having issued its Order Determining Liability and accompanying Findings of Fact and Conclusions of Law on Liability on August 27, 1991, resolving all issues relating to liability from the Phase I trial in these consolidated matters, and the Court, pursuant to stipulation of the parties, having entered its Order dated April 15, 1992, resolving all issues relating to payment and allocation of past response costs which were scheduled to be tried in the Phase II case,

NOW, THEREFORE, the Court ORDERS AND ADJUDGES as follows:

1. The liability determinations as set forth in the Court's Order Determining Liability dated August 27, 1991 are hereby incorporated into this FINAL JUDGMENT as if fully set forth herein.

2. The Court's Findings of Fact and Conclusions of Law on Liability dated August 27, 1991 are hereby incorporated into this FINAL JUDGMENT as if fully set forth herein.

3. The matters as stipulated to by the parties and set forth in the Court's Order of April 15, 1992 are incorporated into this FINAL JUDGMENT as if fully set forth herein.

4. Judgment is hereby entered in favor of the United States of America against CPC International Inc. (CPC), Aerojet General Corporation (Aerojet), Cordova Chemical Company (Cordova/California), and Cordova Chemical Company of Michigan (Cordova/Michigan), jointly and severally, in the amount of $2,600,000 for past response costs incurred and paid by the United States at the Ott/Story/Cordova site. This Judgment includes all direct and indirect costs incurred and paid by the United States Environmental Protection Agency (EPA) through June 30, 1990, prejudgment interest on EPA costs through April 13, 1992, all direct and indirect costs incurred and paid by the United States Department of Justice (DOJ) through September 30, 1990, and prejudgment interest on DOJ costs through April 13, 1992. This Judgment does not address response costs incurred and paid after the above dates. Pursuant to 42

U.S.C. § 9613(g)(2), a declaratory judgment is entered on behalf of the United States and against CPC, Aerojet, Cordova/California and Cordova/Michigan on liability that will be binding in any subsequent actions to recover further response costs.

5. Judgment is entered in favor of the Michigan Department of Natural Resources (MDNR) against CPC, Aerojet, Cordova/California, and Cordova/Michigan, jointly and severally, in the amount of $1,650,000 for past response costs incurred by MDNR at the Ott/Story/Cordova site. This Judgment includes all MDNR direct and indirect costs, including all attorney fees incurred in connection with the Ott/Story/Cordova site, through September 30, 1991 and prejudgment interest through April 13, 1992. This Judgment does not address response costs incurred after the above dates. "Costs incurred" is defined as costs that have been disbursed or paid out by the state. It does not include costs that are due or owed by the state. Pursuant to 42 U.S.C. §9613(g)(2), a declaratory judgment is entered on behalf of MDNR and against CPC, Aerojet, Cordova/California and Cordova/Michigan on liability that will be binding in any subsequent actions to recover further response costs.

6. All claims asserted by CPC against its former insurance carriers in the Third Party Complaint and Amended Third Party Complaint filed by CPC in Civil Action No. G89-0961-CA will be tried separately.

7. The United States' claims against Arnold Ott will be dismissed in accordance with the terms of the Consent Decree executed by those two parties.

8. All other claims, cross-claims, counter-claims and third party claims as asserted by the parties in Case No. G89-961-CA and Case No. G89-10503-CA are hereby DISMISSED with prejudice in accordance with the Court's August 27, 1991, Order Determining Liability, except as specifically stated in Paragraphs 6 and 7 above and herein below. The state law claims of Aerojet, Cordova/California and Cordova/Michigan against MDNR are hereby DISMISSED without prejudice in accordance with the Court's March 6, 1991, Order. The cross-claims and counter-claims as asserted

between Aerojet, Cordova/California and Cordova/Michigan, on the one hand, and CPC, on the other hand, as regards allocation of responsibility are DISMISSED without prejudice, except as may be otherwise voluntarily agreed by those parties in any settlement agreement which they have reached. The cross-claims of Aerojet, Cordova/California and Cordova/Michigan against Arnold Ott are DISMISSED without prejudice in accordance with the Stipulation and Order of Dismissal entered by the Court on January 24, 1992.

9. Except as noted above in paragraphs 6 and 7, this FINAL JUDGMENT constitutes the final action of this Court adjudicating all claims of all parties before the Court in these consolidated actions.

10. Except as provided in Paragraphs 6 and 7, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Court expressly determines that there is no just reason for delay and expressly directs the entry of final judgment on all claims, counterclaims, crossclaims or third-party claims herein.

11. No action taken by any party in approving the form of this Final Judgment, and nothing in the Final Judgment itself, shall constitute an admission of any sort by any party with repect [sic] to any matters whatsoever covered herein, including but not limited to the reasonableness or propriety of the settlement of claims between the Untied States and Arnold Ott as referenced in Paragraph 7, above, or the settlement of claims between CPC, on the one hand, and Aerojet, Cordova/California and Cordova/Michigan, on the other hand, as referenced in Paragraph 8, above.

/s/
Douglas W. Hillman
Senior Judge

Dated: SEP 10, 1992

UNITED STATES OF AMERICA
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,
vs.

Civil Action No.
G89-0961-CA
HON. DOUGLAS
W. HILLMAN

CORDOVA CHEMICAL COMPANY OF MICHIGAN, CORDOVA CHEMICAL COMPANY, AEROJET-GENERAL CORPORATION, CPC INTERNATIONAL INC., and DR. ARNOLD C. OTT,

Defendants.
_____/

CPC INTERNATIONAL INC.,

Plaintiff,
vs.

Civil Action No.
G89-10503-CA

AEROJET-GENERAL CORPORATION, CORDOVA CHEMICAL COMPANY, CORDOVA CHEMICAL COMPANY OF MICHIGAN, and MICHIGAN DEPARTMENT OF NATURAL RESOURCES,

HON DOUGLAS.
W. HILLMAN

Defendants.
_____/

STIPULATION AND ORDER

With regard to the issue of defendants' liability under CERCLA § 107(a), 42 U.S.C. § 9607(a), for payment of costs of response actions as defined in Sections 101(23), 101(24), and 101(25) of CERCLA, the parties stipulate and the Court orders as follows:

1. The United States has incurred $2.6 million in past

response costs at the Ott/Story/Cordova site. These costs include all direct and indirect costs incurred by the United States Environmental Protection Agency (EPA) through June 30, 1990, prejudgment interest on EPA costs through April 13, 1992, all direct and indirect costs incurred by the United States Department of Justice (DOJ) through September 30, 1990, and prejudgment interest on DOJ costs through April 13, 1992. This stipulation does not address response costs incurred after the above dates.

2. The past response costs described in paragraph one, above, are not inconsistent with the National Contingency Plan, 40 C.F.R. Part 300 et seq.

3. The Michigan Department of Natural Resources (MDNR) has incurred $1.65 million in past response costs at the Ott/Story/Cordova site. These costs include all MDNR direct and indirect costs (including all attorneys' fees incurred in connection with the Ott/Story/Cordova site) through September 30, 1991 and prejudgment interest through April 13, 1992. The parties further stipulate that any moneys collected by the MDNR pursuant to a judgment in this matter will be placed in the Michigan Environmental Response Fund.

4. The past response costs described in paragraph three, above, are not inconsistent with the National Contingency Plan, 40 C.F. R. Part 300 et seq.

5. Nothing herein shall affect the parties' right and obligations under any discovery requests pursuant to Rule 34 of the Federal Rules of Civil Procedure, nor shall this stipulation affect any matter not addressed expressly herein.

6. Since Aerojet-General Corp. and CPC International Inc. have reached a voluntary settlement that allocates past response costs between them, this stipulation and order constitutes a disposition of all legal and factual issues before the Court in phase II of the consolidated action.

7. The parties anticipate that a final judgment will be entered by the Court under Rule 54(b) F.R.C.P. in case no. G89-10503-CA and in Phases I and II of case no. G89-0961-CA immediately following notification by all parties that all

outstanding discovery issues have been resolved.

/s/
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United States Department of Justice

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IT IS SO ORDERED.

/s/
Douglas W. Hillman
United States District Judge

Dated: 4/15/92

UNITED STATES OF AMERICA
DISTRICT COURT FOR THE WESTERN
DISTRICT OF MICHIGAN, SOUTHERN DIVISION

CPC INTERNATIONAL, INC.,

Plaintiff, Case No. G89-10503 CA

-vs-

AEROJET-GENERAL CORPORATION, CORDOVA CHEMICAL COMPANY, CORDOVA CHEMICAL COMPANY OF MICHIGAN, and MICHIGAN DEPARTMENT OF NATURAL RESOURCES,

Defendants

---/

UNITED STATES OF AMERICA,

Plaintiff, Case No. G89-961 CA

-vs-

CORDOVA CHEMICAL COMPANY OF MICHIGAN, CORDOVA CHEMICAL COMPANY OF CALIFORNIA, AEROJET-GENERAL CORPORATION, CPC INTERNATIONAL, INC., and DR. ARNOLD C. OTT,

Defendants.

-and-

CPC INTERNATIONAL, INC.,

Third-party Plaintiff,

-vs-

COMMERCIAL UNION INSURANCE COMPANY, et al.,

Third-party Defendants.

---/

August 27, 1991, Decided
August 27, 1991, Filed

OPINION BY: HILLMAN

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON LIABILITY

I. INTRODUCTION

This consolidated action involves a series of claims brought under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.* (1988). The parties are litigating who must pay past and future costs incurred in the environmental cleanup of the soil, surface water and groundwater surrounding a dormant chemical manufacturing plant that has become one of the nation's most severely contaminated areas.

Following denial of summary judgment on liability issues[1], the CERCLA liability phase of this case was tried before the court over 15 days in May and June 1991. This opinion sets forth the court's findings of fact and conclusions of law regarding CERCLA liability.

The parties participating in the liability phase were the United States; CPC International, Inc. ("CPC"); the Michigan Department of Natural Resources ("MDNR"); and Aerojet-General Corporation ("Aerojet"), along with its two wholly owned subsidiaries, Cordova Chemical Company and Cordova Chemical Company of Michigan (collectively, "the Cordova defendants").[2]

CPC, MDNR and the Cordova defendants each defended theories of liability advanced by the United States or other defendants under CERCLA's liability provisions in section 107(a) of the statute.[3] 42 U.S.C. § 9607(a). The court heard live testimony from 29 witnesses, received all or part of dozens of depositions, and admitted more than 2,300 trial exhibits. Following the trial, each party submitted proposed findings of fact and conclusions of law. On June 28, 1991, the parties delivered closing arguments.

After careful consideration of all the evidence and arguments set forth, the court makes the following findings of fact and conclusions of law on the issues of CERCLA liability, in accordance with Fed. R. Civ. P. 52(a).[4]

II. FINDINGS OF FACT

A. Background

1. Ownership

The site of contamination that is the subject of this litigation is located at 500 Agard Road in Dalton Township, Michigan, ("the site"), near Muskegon in a primarily rural area in the western part of the state. Groundwater underneath the site flows through an aquifer in a southeasterly direction toward two waterways, Little Bear Creek and the Unnamed Tributary.

From approximately 1959 to 1986, the site was used by a series of owners as a chemical manufacturing facility for the production of a variety of synthetic organic intermediate chemicals used for pharmaceutical, veterinary and agricultural purposes.

From 1957 to 1965, the site was owned and operated by the Ott Chemical Company, a Michigan corporation ("Ott I").

From 1965 to 1972, the site was owned and operated by a wholly owned subsidiary of CPC International, Inc. ("CPC")[5], known as Ott Chemical Company ("Ott II").

In 1972, Ott II sold the site to Story Chemical Company ("Story"), a Georgia corporation. Story owned and operated the site until it was adjudicated bankrupt in 1977.

In 1977, the Michigan Department of Natural Resources ("MDNR") initiated a regulatory investigation at the site aimed at determining the extent of environmental problems and possible remedies. As part of its efforts, MDNR tried to attract a new purchaser for the site who would participate in a cleanup of the site. As a result of these efforts MDNR

entered into negotiations with Aerojet-General Corporation and its subsidiary, Cordova Chemical Company. These negotiations were fruitful and on October 13, 1977, Cordova Chemical Company ("Cordova/California") signed a "stipulation and consent order" with MDNR that set forth obligations with respect to efforts to remedy environmental contamination problems at the site. One day later, Cordova/California, a wholly owned subsidiary of Aerojet-General Corporation ("Aerojet"), purchased the site from the Story bankruptcy trustee.

In 1978, Cordova Chemical Co. of Michigan ("Cordova/-Michigan"), a wholly owned subsidiary of Cordova/California, became the owner of the site. Cordova/Michigan continues to own the site, but the facility has not been in operation since 1986.

2. Contamination

Prior to the commencement of chemical manufacturing at the site in 1957, the quality of the groundwater underneath the site was excellent.

By 1959, as a result of chemical waste disposal, the water pumped for use in the manufacturing process at the site had become contaminated. By 1964, test results showed that the groundwater flowing underneath the site had become contaminated.

As a result of chemical manufacturing and waste disposal practices at the chemical facility, the soil, surface water and groundwater at the site contain a large number of toxic chemicals.

The principal source of contamination at the site was the use of engineered, unlined lagoons at the northwestern edge of the site for chemical waste disposal. From 1959 to at least 1968, during the Ott I and Ott II periods of ownership, wastewaters and other chemical waste used in the manufacturing process were discharged into the lagoons, where much of the contaminants seeped into the ground and water. No disposal into the lagoons occurred during the Story and Cordova periods.

During the Ott I and Ott II era, chemical waste also entered the ground through the burial and slitting of hundreds of drums in a sandy pit; numerous spills of hundreds of gallons of chemicals from train cars onto railroad tracks; frequent overflows of chemical waste at a cement-lined equalization basin; and the dumping into the woods of buckets of hazardous chemicals that had spilled during the manufacturing process. Some spills of hazardous waste also occurred during the Story and Cordova periods of ownership.

Contamination entering the ground from disposal in the lagoons or through spills then seeped into the ground and migrated away from the site via the aquifer to the southeast, ultimately reaching two waterways, Little Bear Creek and the Unnamed Tributary.

Beginning in 1965 during the Ott I period of ownership and continuing during the Ott II period, purge wells were used intermittently at the site in an attempt to treat the groundwater contamination and retard the spread of contamination away from the site.

However, after 1974 during the Story era of ownership and continuing through periods of ownership by Cordova/California and Cordova/Michigan, the purge wells were not operated for any significant time period, resulting in the continued, unchecked spread of contamination away from the site through groundwater.

During their period of operations, Cordova/Michigan and Cordova/California neither buried waste nor dumped it onto the ground. No chemical waste was disposed into the unlined lagoons that had been used during the Ott I and Ott II eras. Before beginning chemical manufacturing, Cordova/Michigan repaired the equalization basin and chemical sewer system. When operating, Cordova/Michigan discharged chemical waste through off-site disposal or to a sewer that flowed to the Muskegon County treatment facility.

However, two hazardous chemicals used in small amounts by Cordova/Michigan--benzene and 1,2 dichloroethane--are in the soil and groundwater at the site.

3. EPA's response

In 1981, the federal Environmental Protection Agency (EPA) began investigating how to remedy severe contamination problems in the ground and water at the site and surrounding area resulting from hazardous waste disposal practices at the site.

In 1982, the EPA placed the site and surrounding area on the federal government's National Priorities List of locations in need of a long-term remedial response. It is ranked 137th among this country's environmentally hazardous sites most in need of federal remedial action.

The EPA is presently continuing development of a three-phase, multi-million dollar remedial plan for the soil, surface water and groundwater at and surrounding the site.

This litigation consists of a series of consolidated claims regarding who should be liable for cleanup costs under CERCLA, 42 U.S.C. §§ 9607, 9613 *et seq.*

4. Stipulations

The parties have stipulated that the site is a "facility"; that the site contains "hazardous substances"; that "releases" have occurred and threaten to continue, as defined under CERCLA's relevant provisions; and that CPC, MDNR, Aerojet, Cordova/-California and Cordova/Michigan are "persons", as defined under CERCLA's relevant provisions, 42 U.S.C. § 9601.

B. Ownership by Ott I: 1957 to 1965

From 1957 to 1965, Ott I, a publicly traded Michigan corporation, owned and operated the site as a chemical manufacturing plant.

The company was steered by an active board of directors that was significantly involved in the management of the company. Ott I's board of directors made company decisions regarding policies, goals and directions in regular

meetings which were commemorated in detailed minutes. During these meetings, the board conducted working sessions in which company officers presented comprehensive reports on the performance and activities of the various divisions.

Arnold Ott was the leading officer and director of Ott I. From the inception of Ott I in 1956 through its sale in 1965 to CPC, he served as president and chief executive officer of Ott I, and at various times served in other positions, including treasurer. He also served on the company's board of directors, which he chaired for a period of time. In addition, he was the company's largest shareholder, owning nearly 30 percent of its stock in July 1965, a time when the next largest shareholder owned only about 5 percent.

Another leading Ott I official was James Eiszner, a vice-president of marketing.

In 1963, Alexander McFarlane, CPC's chairman of the board, joined the Ott-I board. He soon became impressed by members of Ott I's management group, whom he admired for their dynamic, entrepreneurial spirit. McFarlane became interested in the possibility of tapping the scientific talent he had encountered to help CPC expand its primary business areas of corn wet-milling and consumer food products.

In the spring of 1965, McFarlane and Arnold Ott began to discuss the possibility of CPC acquiring Ott I. McFarlane was interested in bringing Ott I officials, particularly Ott and Eiszner, into the CPC management structure.

As a result of the discussions, McFarlane stepped down from the board of Ott I, and negotiations between top officials of Ott I and CPC followed in April and May 1965.

C. Ownership by Ott II: 1965 to 1972

1. Acquisition of Ott I

In June 1965, the Ott I board approved in principle an agreement and plan of reorganization for the purchase of the company by CPC.

The same month, Arnold Ott moved to New York and assumed responsibilities within CPC management. Ott initially worked with Harold Hellman, CPC's assistant to the chairman. Ott also continued to function as president, chief executive officer, and director of Ott I. Ott's move took place three months before the formal purchase of Ott I.

In September 1965, in preparation for closing on the sale, CPC created the Four Lakes Chemical Company, a wholly owned subsidiary incorporated in Delaware and capitalized with $ 1,000, for purposes of acquiring Ott I. The initial directors of Four Lakes were Arnold Ott and three CPC employees.

On September 22, 1965, the Four Lakes board of directs elected as its officers five people, including Ott and Eiszner, who had held identical positions with Ott I. The board also voted to change its name, effective October 1, 1965, from Four Lakes to the Ott Chemical Company ("Ott II")

Then on September 29, 1965, Ott I's assets and certain liabilities were sold to CPC's subsidiary Four Lakes, in exchange for 75,300 shares of CPC common stock.

Under the agreement, Four Lakes agreed to assume some specific liabilities of Ott I, with Ott I continuing to be responsible for those not designated. Ott I expressly remained liable for "injury or damages to persons or property arising out of the sale of any goods, the provision of any services, or the conduct of" Ott I prior to closing. In addition, the agreement set forth that Ott I "expressly represents that it will pay, or make provision for the payment of, all liabilities and obligations of, or claims against Seller [Ott I] not expressly assumed" by CPC or Four Lakes.

The acquisition by CPC was publicized to customers, creditors, suppliers and the public.

After the sale, Ott I maintained public liability insurance for three years, but it ceased to operate as a functioning corporation. The company's name was changed to Muskegon Chemical Company.

On October 1, 1965, two days after the formal sale of Ott I, Four Lakes officially became the Ott Chemical Company ("Ott II").

Following the acquisition, Ott II functioned in a number of ways as Ott I had prior to the sale. The officers of Ott II remained identical to the officers of Ott I until March 1966. Ott II continued to use the name, "Ott Chemical Compar." Ott II continued to manufacture substantially the same products. Ott II continued to sell products to nearly all of Ott I's customers. Ott II continued to employ most of the same personnel as Ott I. And Ott II continued the same chemical manufacturing operation at the same facility.

CPC nevertheless planned rapid growth for Ott II. Prior to the sale, Arnold Ott reported to the Ott I board that McFarlane and CPC president Howard C. Harder "envisage the chemical operation to reach at least $ 100,000,000 in five years." Following the acquisition, Ott II's production capacity significantly increased as CPC contributed millions of dollars to expansion efforts. This increase in production, in turn, created substantially greater amounts of wastewater and chemical waste in need of disposal in the unlined lagoons, which were expanded to accommodate the additional waste.

2. Board of directors

Following its acquisition of Ott II, CPC actively participated in, and at times controlled, the policy-making decisions of its subsidiary through its representation on the Ott II board of directors.

The Ott II board of directors was an active board during CPC's period of ownership, continuing the tradition established in the Ott I era of functioning in an engaged, participatory manner. The board established policies and goals for the company. It also regularly received reports and presentations from Ott II officers, including accounts of mounting problems with waste disposal. These sessions sometimes lasted three to five hours. Far more than a rubber stamp for management, the Ott II board functioned as a major source of power and decision-making at the company.

CPC had majority control of the board for nearly three years. In the first six months following the acquisition, all four directors on the then four-member board were CPC officials, including Ott. Then, from March 1970 until the sale of the company to Story in June 1972, six of the eleven board members of Ott II were individuals with CPC positions. No fewer than three CPC-affiliated directors served on the Ott II board at all times, and CPC, as 100-percent shareholder, controlled the selection of board members.

CPC directors serving on the Ott board reported back to CPC about Ott programs and gave approval on behalf of CPC for appropriation requests.

During CPC's entire period of ownership of Ott II, the chairman of the Ott II board was always a top-ranking CPC executive. The president of CPC had the authority to determine who served as Ott II's chairman. Arnold Ott served as chairman from 1966 to 1969 at the same time that he was a CPC vice-president and the president of CPC's development company. From 1969-1970, Eiszner was the Ott II chairman in addition to serving as a CPC vice-president. Finally, Beverly Warner served as chairman from 1970 to 1972 while also serving as president of CPC's development company.

Other CPC officials served as particularly influential members of the Ott II board. Within six months of the acquisition, CPC placed Harold Hellman, a CPC vice-president and assistant to CPC's president, on the board. James W. McKee, CPC's financial officer, served on the board from 1968 to 1969.

When the Ott II board expanded from eight to eleven members in 1970, the three additional directors were senior CPC employees, including Warner who was elected chairman and chief executive officer.

CPC executives who were not Ott II board members also occasionally attended Ott II board meetings, including CPC's president and its chairman of the board.

CPC matters were discussed at board meetings, and Ott II board members recognized the need to consider CPC's

interest and seek strong guidance from the parent company during these sessions.

The site of the Ott II board meetings regularly alternated between Ott II's headquarters in Muskegon and CPC's headquarters in New York and later Englewood Cliffs, New Jersey.

3. Management

CPC also actively participated in and exerted control over day-to-day decision-making at Ott II through representation in the highest levels of the subsidiary's management.

Although Ott II corporate officers set the day-to-day operating policies for the company without any need to obtain formal approval from CPC, CPC actively participated in this decision-making because high-ranking CPC officers served in Ott II management positions. In addition, the president of Ott II reported directly to CPC's president.

The Ott II management formulated and implemented the company's day-to-day operating policies, including sales, marketing, advertising, the purchase of raw materials, research and development, hiring and personnel policies, capital expenditures, manufacturing, and environmental matters.

Several individuals served simultaneously as top-ranking Ott II and CPC officials. In some instances, the officials with dual roles at Ott II and CPC worked out of CPC's headquarters in New York.

Arnold Ott was one of the principal CPC officials who exerted control within Ott II management. Following his move to CPC headquarters to assume new corporate responsibilities at CPC even prior to the formal acquisition of Ott I, Ott served as president and chief executive officer of Ott II through December 1966. During this period, Ott worked from CPC's headquarters where he served concurrently as a CPC vice-president responsible for scientific research. In 1968, Ott became the first president of CPC's development company, a division with oversight responsibility for Ott II and other

wholly owned subsidiaries involved in scientific development. During his tenure as president of CPC's development company, Ott also served as Ott II's chief executive officer.

James Eiszner similarly held a major position at CPC at the same time that he was an active and influential member of Ott II's management. Eiszner served as Ott II's president from 1967 to 1970, and in 1968, he became a vice president of CPC's development company, reporting directly to its president, Arnold Ott. Eiszner subsequently ascended through the ranks of CPC, where he eventually became chief executive officer.

In another instance, a high-ranking CPC official became an Ott II senior officer. Beverly Warner, who became president of the development company in 1969, assumed the position of Ott II's chief executive officer in 1970, a position he retained until the sale of Ott II to Story in 1972.

CPC officials thus played decisive roles in Ott II's policy-making structure. As top officers at Ott II, these CPC officials exerted significant control and bore ultimate responsibility over decision-making at the subsidiary in areas including waste disposal, sales, marketing, manufacturing, purchasing and personnel.

The direct involvement and influence of CPC officials in Ott II decision-making at times created controversy and strains within the subsidiary.

While serving as CPC's development company president and Ott II's chief executive officer, Beverly Warner controlled decisions including production, pricing and plant operations at Ott II actually undermined a number of Ott II programs. According to Eiszner, who eventually became CPC's chief executive officer, Warner "made some terrible, terrible management decisions which were probably what led" to the sale of Ott II in 1972.

Eiszner himself was the subject of criticism for improperly giving too much attention to CPC matters while serving in dual management roles at Ott II and CPC. At an Ott II board meeting, board members admonished Eiszner for

improperly allocating too much management time to CPC.

The Ott II company airplane also was frequently unavailable for use by Ott II executives because CPC officials were occupying it for travel between their headquarters and the subsidiary.

Arnold Ott's control over Ott II matters continued even after he relinquished the Ott II presidency and served as CPC's development company president and Ott II chairman. For example, Ott singlehandedly made the decision to move Gerald Roberts, Ott II's controller and treasurer since 1967, to a similar position with the CPC's development company in 1968. Ott also personally selected Roberts' successor at Ott II, David Hackney.

4. CPC's development company

CPC's development company also actively participated in and exerted control over policy-making at Ott II in efforts to enhance performance, shape decisions and affect personnel changes.

The development company, which had oversight responsibility for a number of CPC subsidiaries with scientific or technical specialties, served as another source of policy-making for Ott II. Prior to the closing of sale of Ott II to Story in 1972, Ott II president William T. White described to Story Chemical official Harry Forman: "Ott has been operating as part of the CPC Development Company, and, in addition, Ott has had its own Board of Directors. Thus . . . overall policy has come from two sources. . . ."

Arnold Ott and Beverly Warner served successively as president of the development company during the Ott II era, and each held positions as chief executive officer and chairman of Ott II during their respective tenures with the development company. James Eiszner served as vice-president of the development company.

The development company regularly reviewed Ott II and recommended changes on matters ranging from finances to personnel, exerting pressure to generate more profits and

enhance performance. The company sought to ensure that Ott II met profit plans and policy goals. It also decided, among other things, who would represent CPC on Ott II's board of directors.

Ott II submitted monthly financial reports to the development company and an annual financial prospectus known as the "green book" for review and approval. Top Ott II officers reported to development company officials as well as the Ott II board.

In addition, the development company conducted reviews of the subsidiary's performance that would be followed by calls for change within the subsidiary. For example, in December 1970, Arnold Ott and James Eiszner, who no longer held posts with Ott II, visited the subsidiary at Warner's request. In a December 21, 1970, memo to Warner summarizing the visit, Ott wrote, "No intent was made to be demeaning or critical, but rather to evoke constructive discussion on policy interpretation, goal definition, organization for achieving and means for directing and controlling the profit-generating process." The memo also stated that Ott and Eiszner had "admonished" the Ott II officers "to be more incisive and decisive, more frugal on authorizations of expenditures and to let all the personnel know -- now -- that the Company is off course and the team must win." After another review of Ott II, Arnold Ott took the unusual step of reporting the results to Warner in the form of a telegram sent to his home. It read, in part: "Am absolutely convinced that total financial capability [at Ott II] is grossly lacking. Sound fiscal management impossible. At present don't see plan to make profitable operations for first quarter of '71. Suggest replacing Hackney immediately as one element of remedy." David Hackney was subsequently replaced.

Other CPC officials engaged in similar missions to Ott II in which Ott II officials received instructions and directives on how to improve and change. Development company vice-president Kenneth W. Knief visited Ott II to discuss with Ott officials the accuracy of the subsidiary's profit plans shortly before CPC's sale of Ott II to Story. In a March 27, 1972, memo, following the visit, Knief wrote to Warner that Ott II management "had been advised not to implement any changes

in activity without discussion with Englewood Cliffs," CPC's headquarters.

In sum, CPC engaged in active participation in and significant control over Ott II policy matters and decision-making both internally through representation within Ott II's management and board and externally through the supervision of CPC's development company.

5. Environmental matters

Along with its overall participation in Ott II policies through extensive involvement in Ott II's board and management and through active oversight by the development company, CPC actively participated in Ott II environmental matters.

Discussions of waste disposal problems and potential solutions was a major topic of discussion within the Ott II management structure and board that CPC at times dominated and controlled.

In addition, CPC became directly involved in environmental and regulatory matters through the work of G.R.D. Williams, CPC's governmental and environmental affairs director. Williams coordinated all pollution activities for CPC and its divisions and subsidiaries and became heavily involved in environmental issues at Ott II.

At the suggestion of Ott board member and CPC executive Harold Hellman, Williams became involved with Ott II in 1966 when Ott II was considering waste disposal alternatives to be discussed at an upcoming meeting with the state Water Resources Commission. Hellman recommended involving Williams because he handled all CPC pollution problems and had dealt with similar waste disposal issues at another CPC subsidiary.

CPC's Williams then actively participated in and exerted control over a variety of Ott II environmental matters

In the meeting with the Water Resources Commission, Williams participated in discussions, which, as a result of his

influence, did not include presentation by Ott II of plans for a biological waste treatment facility. Williams did not feel that Ott II should mention the option because he did not think it would be needed as a waste disposal alternative.

CPC's Williams also instructed Ott II officials to limit cooperation with state and federal regulators regarding waste disposal and to consult with CPC before responding to regulatory questionnaires or other inquiries. In a memo to a new Ott II vice-president for manufacturing in 1967, Ott II president Eiszner wrote that Williams "feels that delaying tactics are almost always advisable." In a 1968 memo to top-ranking Ott II officials, Williams instructed that any unannounced visit by regulators "should be stalled for advice from N.Y." and that "any questionnaires should be filled in promptly in pencil and forwarded to Air & Water Programs for review and decision on reply." In a 1969 memo to an Ott II project engineer regarding an upcoming visit by a state regulator, Williams wrote, "As you know, it is our posture to be cooperative on the occasion of such inspections. We answer questions that are not self-incriminating, but we do not volunteer information, particularly about planned capital expenditures, production rates, sales volume and the like." In a 1971 memo regarding an upcoming federal survey to be completed by Ott II plant chemists, Williams instructed that if test results "meet acceptable levels, then the survey should be completed and forwarded by the plant manager. If they do not for any reason meet such levels, then this office should be queried with the details before the survey request is answered."

Other CPC officials also actively participated in Ott II waste disposal matters. For example, in 1970, Hanes Heller, a CPC attorney, negotiated with the state regarding Ott II's use of a county wastewater treatment system. Heller provided detailed instructions to Ott II regarding the objectives in these negotiations and indicated that CPC approval of any agreement was necessary.

6. Financial matters

CPC also exerted significant control over Ott II's finances.

Ott II prepared monthly financial reports for CPC's development company, and each year the subsidiary submitted a detailed financial plan known as the "green book" for review and approval by the parent company.

CPC functioned as Ott II's banker, advancing the subsidiary more than $ 5 million from 1965 to 1971. CPC also assumed a number of loans for Ott II. Ott II's funds were commingled with CPC's in a joint account.

In addition, Ott II had a limit on capital expenditures that were permitted without approval from CPC's board of directors or development company. The ceiling on capital spending that did not require parent approval was initially $5,000 in 1965 and became $200,000 in 1968.

7. Labor matters

CPC officials also actively participated in some Ott II labor matters.

In 1967, CPC officials became involved in the negotiations between Ott II and a union that had previously attempted to organize at other CPC facilities.

CPC also participated in subsequent labor negotiations in 1968 and 1970.

8. Other business matters

CPC also participated in other aspects of Ott II's business. CPC provided staff services and employee benefit programs to Ott II; filed patents; developed, in a cooperative effort between Ott II and another CPC research facility, chemicals for use by CPC; and coordinated outside and accounting services. CPC provided these services without charge to Ott II.

9. Sale of Ott II to Story

On June 9, 1972, CPC sold Ott II to Story for approximately $6.6 million in cash and a $4 million note. The

transaction was made without the knowledge of the Ott II board. For six months prior to the closing, CPC operated the Ott II business for Story. Following the sale to Story, Ott II changed its name back to Four Lakes Chemical Company.

D. Ownership by Story: 1972 to 1977

On June 9, 1972, Story began its chemical manufacturing operations at the site.

By 1974, beset by financial problems, Story abandoned regular use of the purge well system installed during the Ott II era to eliminate contaminants from the groundwater. This abandonment increased the spread of contamination migrating away from the site.

In July 1976, Story filed for bankruptcy organization, and in August 1977, the company was adjudicated bankrupt.

The bankruptcy trustee responsible for the disposition of Story's assets, Maurice Edelman, assumed title on the site and attempted to find a buyer.

E. Agreement between MDNR and Cordova/California: 1977

1. MDNR's environmental emergency

Following Story's bankruptcy in 1977, officials with the State of Michigan began to assess the severe environmental problems presented by the abandonment of the site.

Acting in their regulatory capacity, MDNR officials, together with members of the Governor's office, Public Health Department, and State Police, visited the site and discovered the extreme severity of its environmental problems.

The site's environmental problems were legion. The toll exacted by decades of hazardous waste contamination was abundantly clear. Groundwater pumped to the surface contained foam and a brownish color like root beer. The stench of chemicals permeated the air. Soil excavation revealed the taint of toxic pollution, showing purplish colors.

Hundreds of chemical drums, many piled atop each other, lay around the site, randomly strewn among trees, across pavement and into sandy pits. Many of the drums and barrels were crushed, corroded and leaking, with their contents seeping into the ground. Chemical waste by-products, including thousands of broken bottles, littered the land.

Among the chemicals found at the site were potentially deadly toxics. Tanks of explosive phosgene gas, potentially deadly if released into the air, presented a serious risk to neighboring residents in the event of vandalism or an accident. Other chemicals known as probable human carcinogens were found scattered around the site, including benzene, phenol, methylene chloride, and methyl isocyanate.

Based on these discoveries, MDNR identified five severe environmental problems at the site. The five problems were prioritized in their order of immediate danger to public health: 1) the potentially explosive phosgene gas contained in large tanks at the site; 2) a contaminated water supply in the community surrounding the site; 3) contaminated sludges at the site; 4) contaminated waste containers at the site, particularly barrels and laboratory bottles; and 5) contaminated groundwater flowing underneath the site.

Although the environmental problems at the site did not qualify as a public health emergency under state fire or public health department standards, these dire environmental conditions presented an environmental emergency for MDNR. All of these severe environmental problems were going unattended and threatened to worsen, including the spread of some of the worst groundwater contamination state regulators have encountered to date. As a result, the site posed an environmental emergency in need of prompt regulatory attention from MDNR as the state agency responsible for the protection and conservation of Michigan's natural resources.

MDNR's ability to initiate an immediate cleanup of the environmental emergency at the site was severely limited, however. In 1977, Michigan and the United States had not yet established laws creating revolving funds to provide resources to pay for agency cleanups and liability provisions to seek reimbursement from polluters, such as CERCLA and its

Michigan counterpart, "Act 307", M.C.L.A. § 299.601 *et seq.* Instead, in order to initiate cleanup of an environmentally contaminated site, MDNR needed to obtain a specific legislative appropriation for that purpose. The tools for government cleanups in Michigan were few, and the process for obtaining them was laborious.

In light of the severity of the environmental problems at the site and the unavailability of immediate resources to pay for a cleanup, MDNR, together with other state officials, initiated in early 1977 an effort to expedite legislation appropriating funds for cleanup of the site.

At the same time, MDNR became actively involved in efforts to attract a buyer for the site. The agency was interested in involving a new purchaser in the cleanup as a way of reducing the amount of state money that would be allocated by the legislature for its regulatory response.

2. Negotiations between MDNR and Aerojet's Cordova Chemical Co.

In March 1977, officials from Aerojet and its unincorporated division known as Cordova Chemical Company met with MDNR officials in Michigan to discuss possible purchase of the site. After the meeting, Aerojet elected not to acquire the property, due, in part, to its contamination problems.

Several months later, however, Aerojet had renewed interest in the site. Aerojet was looking for a facility to make ethelenimine ("EI"), a chemical used by its Cordova division in the manufacturing process. Aerojet had recently learned that EI would soon not be available from its previous supplier. As a result, talks between officials from MDNR and Aerojet resumed.

Discussion of the existence and spread of contamination at the site was central to the negotiations between MDNR and Aerojet. MDNR had initially aimed to have its regulatory cleanup of the five environmental problems funded entirely by the site's new purchaser. In contrast, Aerojet was initially reluctant to pay for the cleanup of any contamination created

by prior owners of the site.

The negotiations over the contamination focused on identifying aspects of MDNR's regulatory cleanup efforts at the site that the company would agree to finance. MDNR decided that receiving private funding for some of its cleanup efforts would be acceptable, and Aerojet determined that it would be willing to pay for some cleanup of the preexisting contamination at the site in exchange for promises with respect to future cleanup obligations.

With negotiations progressing, Aerojet signed a stipulation with Story's bankruptcy trustee on September 12, 1977, in which Aerojet agreed to pay for security and safety measures at the site for the succeeding two weeks in exchange for the right to match any offers to purchase the site during the time period. On September 29, 1977, Aerojet signed a similar agreement for two additional weeks.

On October 3, 1977, in anticipation of an imminent agreement to purchase the site, Aerojet incorporated its Cordova division. Cordova Chemical Company ("Cordova/California") became a wholly owned subsidiary of Aerojet, incorporated in California.

After Cordova/California's incorporation, negotiations over the purchase of the site between MDNR and Cordova/California culminated.

3. The stipulation and consent order

On October 13, 1977, a document entitled "stipulation and consent order" was signed by MDNR, Michigan's attorney general's office and Cordova/California. It addressed the problem of environmental contamination at the property and set forth obligations with respect to cleanup activities. The document was not a formal stipulation and consent order that received court approval or settled pending litigation.

One day later, Cordova/California formally purchased Story's assets, including the site, from the bankruptcy trustee for $50,000 and the assumption of certain debts, subject "to all liens, claims and encumbrances" on an "as is," "where is"

basis. In total, Cordova/California paid about $2.5 million for the site, which had been appraised by the State of Michigan as being worth approximately $7.5 million.

The four-page stipulation and consent order set forth the entire agreement between MDNR and Cordova/California with respect to the contamination at the site and obligations between the parties for cleanup. It contained eight stipulated facts and nine terms and conditions.

The stipulated facts in the document recited the five pollution problems identified by MDNR in its initial assessment of the environmental emergency left after the Story bankruptcy, although they were not enumerated as such: groundwater contamination; buried waste sludge; toxic waste drums and containers; water supply problems caused by contaminated residential wells; and phosgene gas.

With respect to the groundwater problem, the stipulated facts stated that:

> . . . Groundwater beneath and surrounding Story Chemical Corporation for an unknown distance has been and is continuing to be contaminated with toxic chemical wastes which originated at the Story Chemical Corporation facility. . . .
> . . . Toxic chemical wastes in the groundwater from Story Chemical Corporation are moving away from the property of the Corporation and may thereby also contaminate nearby surface waters of the State of Michigan.
> . . . There is continued leaching of toxic chemical wastes to the groundwaters of the State of Michigan as a result of the improperly disposed waste sludges buried on the site of Story Chemical Corporation.

Stipulation ¶¶ 1, 3 5.

The stipulated facts also set forth "the most reasonable methods of abating the present pollution problems" at the site:

> a) Disposal of the approximately 8,700 fifty-five gallon drums of solid and liquid chemical waste by the Department of Natural Resources by means of recovery, incineration or landfilling,
> b) Excavation, removal and disposal of approximately 8,000 cubic yards of solid chemical waste, sludges and contaminated soils by the Department of Natural Resources, and
> c) Neutralization, or sale, removal and disposal of the phosgene by Cordova Chemical Company.

Stipulation, ¶ 8. The "most reasonable methods of abating the present pollution problems" did not mention or address the groundwater or water supply problems.

The latter half of the document was entitled "consent order", and it set forth terms and conditions agreed to by MDNR and Cordova/California. Under the consent order, MDNR agreed to remedy the waste container and sludge problems, and Cordova/California agreed to eliminate the phosgene gas and give MDNR $600,000 to defray the costs of the agency's cleanup of the waste containers, sludge and residential wells.

MDNR expressly agreed, at its sole cost and expense, to "completely remove the approximately 8700 fifty-five gallon drums from the Story Chemical Corporation facility and dispose of such drums and their contents. . . ." Consent order, ¶ 2. MDNR also expressly agreed, at its sole cost and expense, to "completely excavate and remove the approximately 8000 cubic yards of solid chemical wastes, sludges and contaminated soils. . . . [and] replace the excavated materials with clean fill." Consent order, ¶ 3.

Cordova/California expressly agreed, at its sole cost and expense, to "neutralize and dispose and/or sell and remove all phosgene presently stored on the Story Chemical Corporation property. . . ." Consent order, ¶ 4.

Cordova/California also agreed to pay $600,000 to MDNR "to abate the pollution problems at the Story Chemical property. . . ." Consent order, ¶ 5. The order set forth a

schedule for the payments and made them contingent upon MDNR obtaining legislative and gubernatorial approval.

With respect to Cordova/California's $600,000 payment and the company's responsibility or liability for the contamination at the site it was acquiring, the consent order stated:

> 6. It is anticipated that said $600,000 will be sufficient to reimburse the Department of Natural Resources fully for all costs and expenses incurred by it in connection with its obligations hereunder and, in addition, to provide at least $100,000 towards the provision of an alternative water supply system to serve residents and commercial establishments whose water supply wells are or may become affected by the groundwater contaminants emanating from the Story Chemical Corporation property. The Cordova Chemical Company shall not have any liability in the event that said $600,000 is not in fact sufficient for the intended purposes nor shall it have any responsibility whatsoever in connection with the provision of any water supply system or potable water pending availability of an acceptable water supply system to said residents and commercial establishments.
>
> Cordova Chemical Company shall not have any responsibility or liability in connection with any other corrective actions which the Department of Natural Resources or any other governmental agency may hereafter deem necessary or advisable in connection with the contamination emanating from the Story Chemical Corporation property, including, without limitation, the creation, maintenance and operation of any purge wells.
>
> . . . .
>
> 8. Compliance with this Consent Order shall constitute full satisfaction of all relief, civil or

> administrative, which might have been, or which otherwise might be obtained against Cordova Chemical Company for any contamination of groundwater or other pollution, injury, or damage, to the environment or otherwise, caused by acts or omissions of Story Chemical Corporation facilities, which acts, omissions or operations occurred prior to the effective date of this Consent Order, whether the contamination, pollution, injury or damage occurs prior to or after the effective date hereof.
>
> 9. By entering this Order the Department of Natural Resources agrees to indemnify and hold Cordova Chemical Company Harmless from any and all losses, damages, injury, costs and expenses (including reasonable attorney's fees) incurred or sustained by Cordova Chemical Company on account of or in connection with the Department's excavation, removal and disposal operations pursuant to paragraphs 2 and 3 of this Consent Order. This provision does not apply to losses, damages, injuries, costs and expenses caused by the willful or negligent acts of Cordova Chemical Company's employees or agents.

Consent order, ¶¶ 6, 8, 9.

In sum, as a result of the negotiations that resulted in the terms and conditions of the stipulation and consent order, MDNR secured assistance and financing from Cordova/ California in its regulatory effort to remedy the severe environmental problems at the site. Specifically, Cordova/ California agreed to remedy the phosgene problem itself and provide $600,000 to pay for or subsidize MDNR's removal of 8,700 drums, the excavation and removal of 8,000 cubic yards of contaminated soils, and effort to remedy the water supply problem.

However, the agreement did not provide for a total cleanup of the site's severe environmental problems. Some aspects of MDNR's ongoing regulatory efforts at the site were

not covered by the terms and conditions of the agreement.

In particular, MDNR and Cordova/California did not reach an agreement regarding a remedy for the groundwater contamination problem. Instead, the fate of the groundwater problems was not resolved, with MDNR left to tackle the problem as part of its overall regulatory responsibility for the site.

In addition, the stipulation and consent order did not provide for removal of all of the site's contaminated sludge. MDNR had determined that the actual quantity of contaminated soil was 71,000 cubic yards, although the stipulation and consent order only proved for removal of 8,000 yards.

Thus, the cleanup responsibilities set forth in the stipulation and consent order were not sufficient to effectuate a total cleanup at the site. The piecemeal nature of the cleanup agreements caused some consternation among MDNR staff. But agency officials had determined that it was desirable to reach an agreement that would secure some assistance and financial support from the site's new owner as the MDNR began its initial regulatory activities.

After the signing of the stipulation and consent order, MDNR obtained a legislative appropriation to pay for the cleanup. On February 6, 1978, Michigan's Governor William Milliken signed a bill appropriating $1.27 million in funds for MDNR's cleanup of the site.

The appropriation consisted of $670,000 of state money and $600,000 paid to MDNR by Cordova/California under the consent order. The bill allocated $500,000 for "barrel and sludge removal", $600,000 for "alternative water supply" and $170,000 for "new ground water purging system."

Although the bill did not allocate money for a total cleanup, the appropriation contained funding for MDNR regulatory cleanup activities at the site that were not part of the agency's express obligations under the stipulation and consent order. Specifically, the allocation of $170,000 for groundwater purging was not related to any obligations set

forth in the stipulation and consent order. Instead, the $170,000 allocation for the purging system funded MDNR's own regulatory effort to begin the cleanup of groundwater contamination. The $170,000 was requested by MDNR to pay for the design, installation and first-year of operation of a purge well system.

Several legislative and gubernatorial aides who became involved in passage of the appropriations bill did not understand that MDNR was requesting funding for regulatory activities at the site that were outside of the obligations made under the stipulation and consent order. The aides had not participated in the negotiations between MDNR and Cordova/California. They also did not understand that the appropriations would not effectuate a total cleanup of the site. This lack of knowledge about the cleanup led to the drafting of three documents that contained erroneous information: a letter drafted for Governor Milliken stating that the $1.27 million bill would pay for a "total cleanup" and two legislative fiscal analyses that implied that the stipulation and consent order obligated MDNR to install a groundwater purging system by MDNR. Trial exhibits 1028, 1027, 1059.

Following passage of the bill, Cordova/California and MDNR fulfilled their cleanup obligations under the stipulation and consent order. Cordova/California neutralized and removed the phosgene gas at the site. MDNR, with private contractors, removed 8,000 cubic yards of sludge and 8,700 drums of waste.

During its cleanup activities, MDNR discovered additional drums that had been buried by previous owners and not previously identified by the state in its investigation. One of the drums exploded during excavation work. MDNR did not have funds appropriated to pay for this additional cleanup. As a result, the drums were reburied as a precautionary measure until funding for their removal could be obtained.

MDNR's attempts to address the groundwater contamination problem continued. In an April 3, 1978, "special program directive", an MDNR official, designated as a "highest" priority the task of "removal of contaminated groundwater and installation of public water supply" at the site.

MDNR subsequently commissioned studies in an attempt to determine the most effective plan for eliminating contaminated groundwater. The studies aimed to analyze the extent of the problem and the flow of groundwater in order to place purge wells in locations that would most effectively control and recapture spreading contamination. Based on the studies, MDNR determined that an effective groundwater purging system might cost $37.7 million.

In its efforts to determine the most effective way to implement a purge system, the state expended the $170,000 it had been allocated for the new purging system. As a result, MDNR was not able to initiate any actual purging operations with the appropriations.

Following MDNR's and Cordova/California's fulfillment of their cleanup obligations under the stipulation and consent order, contamination remained at the site. Groundwater contamination continued to migrate. Thousands of yards of contaminated sludge remained in the ground and continued to leech. The recently discovered barrels also remained.

F. Ownership by Cordova/California and Cordova/Michigan: Since 1977

1. Acquisition of the site

Aerojet was actively involved in Cordova/California's acquisition of the site.

A team of Aerojet officials led the initial negotiations with MDNR in March 1977. One Aerojet individual was the company's director of risk management, and another was the vice president of operations for the Cordova division.

When negotiations resumed after the Cordova division learned it would be losing its principal supplier of ethelenimine, it was Aerojet officials again who became involved. Aerojet officials and employees conducted economic, environmental, and engineering studies regarding the site to determine its compatibility with the Cordova division. Aerojet's chief negotiators were its Cordova division's

controller and vice president of operations.

In addition to signing two consecutive stipulations with the bankruptcy trustee giving the company the right of first refusal to purchase the site for a two-week period, Aerojet officials drafted an initial stipulation and consent order that it presented to MDNR shortly before the incorporation of Cordova/California.

2. Incorporation of Cordova/California, Cordova/Michigan

At two significant junctures in the history of ownership of the site, Aerojet incorporated a wholly owned subsidiary to take title of the property.

Aerojet incorporated its Cordova division as Cordova/California in October 1977, just before acquisition of the site. Then, shortly before the commencement of its chemical manufacturing at the site, Aerojet incorporated Cordova/Michigan as a wholly owned subsidiary of Cordova/California.

On October 3, 1977, just eleven days before the formal purchase of the site, Aerojet incorporated its Cordova division as a wholly owned subsidiary, Cordova/California. Cordova/California was capitalized by Aerojet with $10,000 in common stock and $7.1 million in addition paid-in capital. As a result, a subsidiary of Aerojet, rather than Aerojet itself, purchased the site.

Despite the change in form, the company officials participating in the acquisition remained the same during the final stages of negotiation. Richard Swanson, Marshall Howes, and T.J. Glad, formerly the negotiators on behalf of Aerojet's Cordova division, represented Cordova/California. This sudden change in corporate form resulted in some confusion within the company. Swanson, who signed the consent order on behalf of "Cordova Chemical Company", did not know whether he signed the document on behalf of the Cordova division or Cordova/California.

After its incorporation and acquisition of the site in October 1977, Cordova/California began a major construction

project to convert the facilities into a manufacturing plant for EI, the chemical which Aerojet's Cordova division had received from an outside supplier.

Then, on November 2, 1978, with construction complete and manufacturing operations about to begin, Cordova/California created its own wholly owned subsidiary, Cordova Chemical Company of Michigan ("Cordova/Michigan"), and transferred ownership of the site to Cordova/Michigan. Cordova/Michigan was capitalized by Cordova/California with $250,000 in common stock and $2.8 million in additional paid-in capital.

As a result, a subsidiary of Aerojet's subsidiary, rather than Aerojet's subsidiary itself, owned the site at the time that chemical manufacturing commenced.

3. Aerojet's direct involvement with the site

After the incorporation of each of its two subsidiaries for operations of the site, Aerojet continued to participate directly in decision-making regarding use of the facility.

In 1978, Aerojet closely supervised the construction of additional facilities at the site that were necessary for the conversion to a manufacturing plant for ethelenimine.

From 1979 until at least 1984, Aerojet participated in periodic discussions and negotiations with prospective purchasers regarding possible sale of the site. An Aerojet vice-president of corporate development served as the companies' designated individual for meetings with prospective purchasers.

In November 1979, one year after the incorporation of Cordova/Michigan, Aerojet prepared a prospectus for review by a West German company considering acquisition of the site.

After production activities at the site ceased in 1985, Aerojet participated in the continuing management of the site and leased portions of the site to third parties. Cordova/Michigan's manager of the Muskegon site reported directly to Aerojet officials working in an unincorporated

division, Aerojet Investments. The manager's budget was approved by Aerojet.

4. Integration of business

Despite their separate corporate existence, Cordova/California and Cordova/Michigan operated as a single, integrated business entity. The subsidiaries performed functions that previously had been part of the operations of Aerojet's own Cordova division prior to the incorporation.

EI manufactured by Cordova/Michigan at the site was shipped to Cordova/California's main plant for use in the production of several drug intermediates. Receiving supplies of El was critical to the success of Cordova/California, which was the largest user of the chemical in the United States.

Integration of the businesses of Cordova/California and Cordova/Michigan extended beyond the supplying of EI. Cordova/California handled marketing services for Cordova/Michigan, including solicitation of business and the processing of orders received. Cordova/Michigan did not even retain the paperwork regarding its customers' orders. In addition to providing marketing services for Cordova/Michigan, Cordova/California managed all payroll, management, and accounting matters for both companies. Cordova/Michigan periodically paid Cordova/California for these services.

Cordova/California also established the sales schedule for Cordova/Michigan, and Cordova/California participated in decisions regarding Cordova/Michigan's production quotas and inventory controls.

5. Board of directors

Following the separate incorporation of Cordova/California and Cordova/Michigan, the subsidiaries' board of directors were inactive and nearly non-existent. As a result, policy-making for the companies was primarily handled by Aerojet officials serving in the subsidiaries' management.

Cordova/California and Cordova/Michigan never actually held regular board of directors meetings. Benjamin

Simmons, president of Cordova/California and Cordova/Michigan as well as a director of both corporations, could not recall ever attending a board of directors meeting or even that any such meeting was ever held.

The boards of Cordova/California and Cordova/Michigan were composed almost entirely of Aerojet employees, and the boards essentially functioned to consent to the policies established by management.

6. Management

Aerojet participated actively in and exerted control over day-to-day operations at Cordova/California and Cordova/Michigan through widespread representation within the management ranks of the subsidiaries. As a result, the managements of Cordova/California and Cordova/Michigan were separate from Aerojet in form, not substance.

Throughout the Cordova era, leading Aerojet corporate officers held identical or similar positions with the wholly owned subsidiaries. After the incorporation of Cordova/California and Cordova/Michigan, no major distinction among the management groups for the three companies existed.

Aerojet officials dominated the management of the Cordova subsidiaries. At least 20 different corporate officers simultaneously held identical or nearly identical positions with Aerojet, Cordova/California and Cordova/Michigan during the Cordova era. At least 25 officers held the same posts with Cordova/California and Cordova/Michigan at the same time.

The president of the three companies was the same individual on at least two occasions totalling more than four years. In addition, the president of Cordova/California and Cordova/Michigan was the same person on three occasions. Individuals who served simultaneously as officers with Aerojet, Cordova/California and Cordova/Michigan were paid by Aerojet. Other Cordova/Michigan officers were paid by Cordova/California.

Other individuals held the same or nearly identical posts

in triplicate, serving simultaneously as vice president, treasurer, assistant treasurer, secretary, and assistant secretary of Aerojet, Cordova/California and Cordova/Michigan. In addition to these positions, Cordova/California and Cordova/Michigan shared officials serving as executive vice-president and controller.

This domination occurred from the inception of the separate corporate existence of Cordova/California. Immediately after Cordova/California's incorporation, a number of Cordova division officials merely assumed identical titles and responsibilities with Cordova/California, including the president, vice-president for operations, controller, and vice-president for marketing. In short, Cordova/California was operated as it had when it was the unincorporated Cordova division; a change in form, not substance had occurred. Similarly, the separate incorporation of Cordova/Michigan merely resulted in a multiplicity of titles, not a change in the way operations functioned at the site.

Aerojet further exercised influence over the management of its subsidiaries by having top officers report directly to the parent company, rather than to the subsidiaries' board of directors. For example, Benjamin Simmons, president of Cordova/-California from 1977 to 1979, reported to Aerojet president J.H. Volbrecht and senior vice-president Clay Matthews. Delores Dorsey, who served as treasurer of all three companies for nearly eight years, reported directly to Aerojet's vice-president of finance, not the directors or presidents of the subsidiaries.

Aerojet also exerted control over the management of its subsidiaries by handling personnel decisions. Aerojet officials interviewed applicants and selected replacements for vacancies within Cordova/California and Cordova/Michigan.

In sum, Aerojet actively participated in the management and direction of Cordova/California and Cordova/Michigan through representation within their management groups, which frequently mirrored the management of Aerojet itself. As a result of this widespread involvement in the management of its subsidiaries, Aerojet participated in and controlled decision-making in all facets of the company, including sales,

marketing, manufacturing and waste disposal.

7. Financial matters

In addition to Aerojet's control over day-to-day operations at the subsidiaries through domination of management, Aerojet exercised total financial control over Cordova/California and Cordova/Michigan.

Cordova/California and Cordova/Michigan lacked authority to open a bank account, a power retained solely by Aerojet. All money generated by the subsidiaries was deposited into an Aerojet account. Cordova/California and Cordova/Michigan advised customers to send payments to a California post office box belonging to Aerojet.

In 1984, Aerojet assigned $25 million in worthless debt owed to it by Cordova/Michigan to Cordova/California, which eliminated more than $13 million owed by Aerojet to Cordova/California. The agreement assigning the debt was prepared by an Aerojet attorney and signed by Cordova/California's treasurer, who did not make any independent determination of whether the agreement was in the best interest of Cordova/California.

III. CONCLUSIONS OF LAW

A. CERCLA overview

CERCLA liability attaches if: 1) a release of hazardous substances has occurred, 2) at a facility, 3) causing a plaintiff to incur response costs, 4) and the defendant is a responsible party as defined under section 107(a), 42 U.S.C. § 9607(a). *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 668 (5th Cir. 1989); *United States v. Aceto Agricultural Chemicals Corp.*, 872 F.2d 1373 (8th Cir. 1989); *CPC Int'l Inc. v. Aerojet-General Corp.*, 731 F. Supp. 783, 786 (W.D. Mich. 1989).

In this liability trial, the parties stipulated to the first three elements of liability, including that each party has incurred response costs in connection with the cleanup at the site. As a result, the central liability issue is whether CPC, MDNR, Aerojet, Cordova/California or Cordova/Michigan

are responsible parties under section 107(a).

Section 107(a) establishes four bases for CERCLA liability. It provides:

> Notwithstanding any other provisions or rule of law, and subject only to the defenses set forth in subsection (b) of this section--
>
> (1) the owner and operator of a . . . facility,
>
> (2) any person who at the time of a disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility . . . owned or operated by another party or entity and containing such hazardous substances, and
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable. . . .

42 U.S.C. § 9607(a).

In this action, the parties have invoked the first three of these liability provisions in bringing their claims: liability under section 107(a)(1) as a present owner and operator; liability under section 107(a)(2) as a past owner and operator at a time of a disposal; and liability under section 107(a)(3) as an arranger for disposal. Because the parties have stipulated that each is a "person" as defined under CERCLA, the question of their respective liability turns solely on whether status as a present owner and operator, past owner or operator at a time of disposal or arranger for disposal applies.

In applying these liability provisions to the facts of this

case, the court is mindful that CERCLA is a broadly remedial statute. Although some of CERCLA's provisions are vague and its legislative history sparse, the statute clearly aims to achieve prompt cleanup of hazardous waste sites by placing the ultimate financial responsibility for cleanup on those responsible for the pollution. *J.V. Peters & Co. v. Administrator*, 767 F.2d 263, 264 (6th Cir. 1985); *Walls v. Waste Resource Corp.*, 761 F.2d 311, 318 (6th Cir. 1985). As one court stated after examining the statute's legislative history, "Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created." *United States v. Reilly Tar & Chemical Corp.*, 546 F. Supp. 1100, 1112 (D. Minn. 1982).

In light of CERCLA's remedial goals, the court is obligated to construe the statute's liability provisions broadly to avoid frustrating its legislative purpose. *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1045 (2d Cir. 1985); *United States v. Conservation Chemical Co.*, 619 F. Supp. 162, 192 (W.D. Mo. 1985); *United States v. Mottolo*, 605 F. Supp. 898, 902 (D.N.H. 1985). To the extent that liability under CERCLA is greater than under common law principles of tort and corporations, it is the result of CERCLA's statutory language and legislative intent, which the court is bound to follow unless and until it is altered by Congress.

B. Conclusions of law regarding CPC liability

1. Claims against CPC

The United States, MDNR and the Cordova defendants claim that CPC is liable under section 107(a)(2) as a past owner or operator of the site. The parties claim that CPC as a parent corporation is liable because of its involvement with its former wholly owned subsidiary, Ott II, which owned the site from 1965 to 1972. The parties also allege that CPC should be held liable because Ott II is the successor corporation of Ott I.

2. Section 107(a)(2) "operator" liability

a. Parent corporation liability under section 107(a)(2)

After studying the statute, prior case law[6] and the critical literature on the subject[7], it is clear to the court that section 107(a)(2) liability may attach to a parent corporation in two ways. The first basis for liability of a parent corporation is direct liability under the "operator" language of CERCLA's section 107(a)(2). The second basis for liability is through common law veil-piercing, which may arise in any liability case involving a corporate defendant.

In determining that parent corporations may be held directly liable under CERCLA, the court relies on the language of the statute itself. Section 107(a)(2) of CERCLA holds liable "any person who at the time of disposal of any hazardous substances owned or operated any facility at which such hazardous substances were disposed of." 42 U.S.C. § 9607(a)(2). The statute defines "owner or operator" circuitously to mean:

> . . . (ii) in the case of an onshore facility . . . any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated or otherwise controlled activities at such facility immediately beforehand. Such term does not include a person, who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest in the . . . facility.

42 U.S.C. § 9601(20).

Though lacking in specificity, the plain language of CERCLA makes it unmistakably clear that direct liability may attach to parties other than the actual owners of hazardous waste facilities.[8] To hold that actual ownership is mandated by CERCLA's liability provisions, a court would have to disregard the express language that makes liable those persons who have owned *or operated* a contaminated facility. Thus,

reading the statute to employ only traditional concepts of ownership and liability through veil-piercing would require a court to ignore not only the statute's broadly remedial intent, but also its explicit words.[9] As a result, CERCLA liability may attach to parent corporations that have acted in a manner that constitutes operation of a facility even though they have not actually owned the site.

Determining what kind of activity by a parent corporation creates liability as an operator under section 107(a)(2) is a more difficult question. CERCLA provides little guidance. By defining "owner or operator" circuitously, the statute fails to make explicit the what kind of "operator "it is intended to reach. As a result, different tests for liability have been developed by the courts. *Compare Kaysor-Roth,* 910 F.2d at 27 (holding that to find parent corporations liable under CERCLA "at a minimum . . . requires active involvement in the activities of the subsidiary"); *Mobay,* 761 F. Supp. at 353-54 (holding parent corporations may be liable if they participated in the management or exercised control over a corporate entity) *with Bunker Hill,* 635 F. Supp. at 672 (holding liability turns on three-part test based on whether the parent corporation had the capacity to control or prevent release of hazardous material); *Kelley v. Arco Indus. Corp.,* 723 F. Supp. 1214, 1220 (W.D. Mich. 1989) (adopting a test of whether a corporate individual "could have prevented or significantly abated the release of hazardous substances").

After visiting this issue over several months through exhaustive briefing for summary judgment and trial, I have concluded that CERCLA broadens the potential for liability of parent corporations without discarding entirely the traditional concept of limited liability that is central to corporate law. By expressly including as liable parties those that have "operated" facilities, Congress unmistakably expanded the reach of CERCLA beyond the limited realm of those who have "owned" sites. But the statute and its legislative history do not suggest that CERCLA rejects entirely the crucial limits to liability that are inherent to corporate law.

Accordingly, it seems that CERCLA's "owned or operated" language forges a new, middle ground. It is a ground that at once accommodates the general principle of

limited liability and the broader principle of liability attaching for operative activity. To permit these principles to coexist under CERCLA, the liability of a parent corporation cannot attach simply because a parent has had involvement with its subsidiary in a manner merely consistent with their investment relationship. Rather, a parent must have actually operated the business of its subsidiary.

In this court's view, then, a parent corporation is directly liable under section 107(a)(2) as an operator only when it has exerted power or influence over its subsidiary by actively participating in and exercising control over the subsidiary's business during a period of disposal of hazardous waste. A parent's actual participation in and control over a subsidiary's functions and decision-making creates "operator" liability under CERCLA; a parent's mere oversight of a subsidiary's business in a manner appropriate and consistent with the investment relationship between a parent and its wholly owned subsidiary does not.

Factors to consider in assessing whether a parent corporation operated its subsidiary include the parent's participation in the subsidiary's board of directors, management, day-to-day operations, and specific policy matters, including areas such as manufacturing, finances, personnel and waste disposal. In addition, determining the origin and business function of the subsidiary in the context of the parent corporation's business may be helpful in determining whether the parent has operated a wholly owned subsidiary. Other evidence may be less probative if it is simply indicative of the actions of a prudent investor, rather than an active operator, including monitoring of a subsidiary's financial performance, consolidation of corporate business matters such as accounting and legal work, and cooperation between the subsidiary and the parent in research. In the final analysis, each case must be decided on its own unique facts and circumstances.

In arriving at this standard for direct CERCLA liability of parent corporations, the court joins a majority of courts that have similarly concluded that CERCLA requires significant control and active participation by a parent corporation for liability to attach. *See, e.g., Kaysor Roth,* 910

F.2d at 27; *Mobay*, 761 F. Supp. at 354; *Rockwell Int'l Corp. v. IU Int'l Corp.*, 702 F. Supp. 1384, 1390 (N.D. Ill. 1988); *Colorado v. Idarado Mining Corp.*, 1987 U.S. Dist. Lexis 14254 (D. Colo. 1987); *New York v. Exxon Corp.*, 112 Bankr. 540, 547 (S.D.N.Y. 1990).

The second basis for CERCLA liability of parent corporations is indirect or vicarious liability through the traditional common-law theory of veil-piercing. When a subsidiary itself is liable under CERCLA, a parent corporation may be held liable under circumstances that make it appropriate to disregard their separate corporate existence. In the Sixth Circuit, when applying a common law principle such as the vicarious liability of parent corporations to the question of CERCLA liability, state law controls. *Anspec Co., Inc. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1248 (6th Cir. 1991).

Under Michigan law, piercing the corporate veil to reach a parent corporation or other investor is an equitable doctrine that is applied to prevent fraud, illegality or injustice. *See Schusterman v. Employment Security Comm.*, 336 Mich. 246, 57 N.W.2d 869 (Mich. 1953); *Soloman v. Western Hills Dev. Co.*, 110 Mich. App. 257, 312 N.W.2d 428, 431 (Mich. App. 1981). Separate corporate existence is disregarded only in limited circumstances, and each case considering whether to disregard the corporate entity turns on its own unique factual circumstances. *Lettinga v. Agristor Credit Corp.*, 686 F.2d 442, 446 (6th Cir. 1982); *Ann Arbor v. University Cellar, Inc.*, 401 Mich. 279, 258 N.W.2d 1 (Mich. 1977); *Brown Bros. Equip. Co. v. State*, 51 Mich. App. 448, 215 N.W.2d 591 (Mich. App. 1974).

A Michigan court may generally pierce the veil of a parent corporation after finding that the subsidiary has been a mere instrumentality of the parent, that the separateness between the corporations has been used to commit fraud or wrong, and that unjust loss or injury to the plaintiff has occurred. *Bodenhamer Bldg. Corp. v. Architectural Research Corp.*, 873 F.2d 109, 112 (6th Cir. 1989); *Maki v. Copper Range Co.*, 121 Mich. App. 518, 328 N.W.2d 430 (Mich. App. 1982).

It also may be appropriate under some circumstances to pierce the veil of a separate corporate entity to serve the

interests of justice when an individual is the sole shareholder of a corporation, as in the case of a parent corporation and its wholly owned subsidiary. *See Lettinga*, 686 F.2d at 446; *Pettaway v. McConaghy*, 367 Mich. 651, 116 N.W.2d 789, 790 (Mich. 1962); *Montgomery v. Central Nat'l Bank & Trust Co.*, 267 Mich. 142, 255 N.W. 274, 276 (Mich. 1934). For example, the fiction of the corporate form may be disregarded when a complete identity of interests exists between two corporate individuals so as to suggest that one was simply the alter ego of the other. *See Pettaway*, 116 N.W.2d at 790; *Williams v. American Title Ins. Co.*, 83 Mich. App. 686, 269 N.W.2d 481, 486 (Mich. App. 1978); *Montgomery*, 255 N.W. at 276.

b. Liability of CPC under section 107(a)(2)

To determine first whether CPC is directly liable under section 107(a)(2), the court has engaged in a highly fact-specific inquiry into the history of CPC's involvement with Ott II. In assessing CPC's level of participation and control in Ott II's activities, the court has evaluated various aspects of Ott II's business and its parent-subsidiary relationship, including: the role and composition of Ott II's board of directors; the role and composition of Ott II's management; the conduct of high-ranking CPC officials with respect to Ott II; the supervision of Ott II by CPC's development company; CPC's budgetary and capital expenditure restraints on Ott II; and CPC's involvement in specific Ott II policy matters, including waste disposal and labor problems.

After considering these and all the facts regarding CPC's involvement with Ott II, the court holds that CPC is directly liable under section 107(a)(2) as an operator because CPC actively participated in and exerted significant control over Ott II's business and decision-making. CPC's history of involvement in Ott II through its board, management, the CPC development company, and specific policy matters including hazardous waste disposal, demonstrates the high level of participation required for direct liability to attach to CPC under section 107(a)(2).

The court has considered the following facts particularly probative: 1) CPC's 100-percent ownership of Ott II; 2) CPC's active participation in, and at times majority control over, Ott

II's board of directors, which was an active decision-making body chaired by a CPC official throughout the Ott II era; 3) CPC's involvement in major decision-making and day-to-day operations through CPC officials who served within Ott II management, including the positions of president and chief executive officer; 4) the conduct of CPC officials with respect to Ott II affairs, particularly Arnold Ott, James Eiszner and Beverly Warner; 5) the function of the CPC development company as another source of policy-making for Ott II; 6) the active participation of and control by CPC officials in Ott II environmental matters, particularly through CPC's environmental director G.R.D. Williams who helped formulate Ott II policies, participated in regulatory meetings and issued directives regarding Ott II's responses to regulatory inquiries; 7) the active participation of CPC officials in Ott II labor problems; and 8) the financial control exerted by CPC through its approval of Ott II's budgets and major capital expenditures.

Liability attaches here because the evidence shows active participation and control by CPC in Ott II affairs both internally through the subsidiary's board and management and externally through the policies of the development company and the actions of individual CPC officials. The evidence shows a level of participation and control by CPC that exceeds the bounds of an interested investor and enters the realm of an active operator. When a parent corporation permeates the board, management and decision-making of a wholly owned subsidiary that was disposing of hazardous waste, operator liability directly attaches under CERCLA.

Based on all of these facts, the court holds CPC directly liable under section 107(a)(2) as an owner or operator during a period of disposal of hazardous waste.

Because the court has concluded that CPC is directly liable under CERCLA's section 107(a)(2), it need not reach the question of whether CPC should be held liable under CERCLA through common-law veil-piercing, which is an alternative theory of liability.

Similarly, CPC's direct CERCLA liability makes it unnecessary to reach at this juncture the parties' claim of CPC

liability arising from Ott II allegedly have been a successor corporation to Ott I.

A successor corporation may be a liable person under CERCLA. *Anspec*, 922 F.2d at 1247-48. Successor liability is a theory that may be applied under limited circumstances to reach parties that otherwise might escape responsibility for cleanup costs. *See, e.g., Smith Land & Improv. Corp. v. Celotex Corp.*, 851 F.2d 86 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029, 102 L. Ed. 2d 969, 109 S. Ct. 837 (1989); *Kelley v. Thomas Solvent Co.*, 725 F. Supp. 1446, 1457-59 (W.D. Mich. 1989); *United States v. Vertac Chem. Corp.*, 671 F. Supp. 595, 614-19 (E.D. Ark. 1987). In this case, however, CPC's direct liability for the cleanup costs at the site eliminates the necessity of determining the successorship question for liability purposes; based on its direct liability under section 107(a)(2), CPC is jointly and severally liable for cleanup costs at the site.

Nevertheless, the question of successor liability--namely, whether CPC may be held liable for the hazardous waste disposal of the Ott I era under Michigan successor liability and veil-piercing principles--could have some relevance to the court's future determination on the issue of apportionment. A responsible party's degree of involvement in the disposal of hazardous waste, the amount of hazardous waste involved and the degree of care exercised by the parties are some of the factors that a trial court may consider in determining the parties' proportionate shares in a contribution action. *United States v. R.W. Meyer, Inc.*, 932 F.2d 568 (6th Cir. 1991). As a result, the court defers any conclusions with respect to successorship until it reaches allocation issues at the conclusion of the remedy phase of this case.[10]

C. Conclusions of law regarding MDNR liability

1. Claims against MDNR

CPC and the Cordova defendants claim that MDNR should be held liable under CERCLA for its activities at the site. CPC alleges that MDNR, Aerojet and Cordova/ California are liable under section 107(a)(3) as arrangers of disposal arising from the October 1977 stipulation and

consent order entered into by MDNR and Cordova/California. CPC, Aerojet, Cordova/California and Cordova/Michigan also allege that MDNR is liable under section 107(a)(2) as an operator due to its cleanup efforts at the site.

2. Section 107(a)(3) "arranger" liability

As the court has previously discussed, CPC's section 107(a)(3) claim, though novel, is tenable under the broadly remedial provisions of CERCLA. *CPC Int'l Inc. v. Aerojet-General Corp.*, 759 F. Supp. 1269, 1277-81 (W.D. Mich. 1991); *CPC Int'l Inc v. Aerojet-General Corp.*, 731 F. Supp. 783, 789-90 (W.D. Mich. 1989).

CPC has alleged that MDNR agreed at the time of Cordova/California's acquisition of the site, to remedy the groundwater contamination problem through resumed operation of purge wells. Because the purge wells were not operated and the groundwater contamination continued to spread, CPC claims, MDNR, Aerojet and Cordova/California should all be held liable for an arrangement for disposal of contaminated groundwater that actually worsened the problem.

In opinions ruling on pretrial motions, the court has recognized that the unchecked spread of groundwater contamination qualifies as disposal under CERCLA's statutory definition of the term. 42 U.S.C. § 9601(29) (adopting 42 U.S.C. § 6903(3)); *CPC*, 759 F. Supp. at 1278; *CPC*, 731 F. Supp. at 789. In addition, the court has noted that, if proved, CPC's allegations would make a case for CERCLA liability that is consistent with the statute's goal of placing the burden of cleanup on the parties responsible for creating or worsening an environmental problem. *CPC*, 759 F. Supp. at 1279-80. *See also United States v. Waste Indus. Inc.*, 734 F.2d 159, 164 (4th Cir. 1984); *Emhart Indus., Inc. v. Duracell Int'l, Inc.*, 665 F. Supp. 549, 574 (M.D. Tenn. 1987); *United States v. Price*, 523 F. Supp. 1055 (D.N.J. 1981), *aff'd*, 688 F.2d 204 (3d Cir. 1982).

Several factual disputes precluded summary judgment on CPC's arranger claim. *CPC*, 759 F. Supp. at 1278-81. The central question in dispute was whether an agreement actually

existed between MDNR and Cordova/California for MDNR to remedy the groundwater contamination problem.

After hearing all the testimony and evidence, the court has found that no agreement existed among the parties with respect to the groundwater contamination problem. Instead, the fate of the contaminated groundwater was left unresolved by the parties. After MDNR and Cordova/California reached an agreement regarding other cleanup responsibilities at the site, MDNR attempted to address the groundwater problem as part of its ongoing regulatory activity over the severe environmental problems at the site. As a result, MDNR requested and obtained a $170,000 appropriation for a new groundwater purging system.

Because no arrangement was made between MDNR and Cordova/California with respect to the groundwater contamination, MDNR, Aerojet and Cordova/California are not liable under section 107(a)(3) as arrangers for disposal.

Other facts also preclude imposition of liability against MDNR under section 107(a)(3). As the court has previously noted, for liability to attach to a party without actual ownership or possession of a facility, a nexus must exist in which a party has assumed responsibility for or control over the disposition of hazardous waste. *CPC*, 759 F. Supp. at 1278; *CPC*, 731 F. Supp. at 789-90. *See also United States v Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726, 743 (8th Cir. 1986), *cert. denied*, 484 U.S. 848, 98 L. Ed. 2d 102, 108 S. Ct. 146 (1987); *Stilloe v. Almy Bros., Inc.*, 759 F. Supp. 95, 103-04 (N.D.N.Y. 1991); *United States v. Mottolo*, 629 F. Supp. 56, 60 (D.N.H. 1984).

In this case, a nexus of control or possession is lacking in the case against MDNR because MDNR's involvement in cleanup activities at the site was only regulatory. MDNR merely worked to eliminate or reduce severe environmental problems that had been left by prior owners and threatened public health and the environment. While dicta in the court's opinions on pretrial motions recognized the possibility of a sufficient nexus between MDNR and the site, MDNR proved at trial that a nexus of ownership or control between MDNR and the site did not exist.

Even if a prima facie section 107(a)(3) case against MDNR had been made, MDNR would not be liable because its actions at the site were taken in response to an environmental emergency. Section 107(d)(2) states, in relevant part:

> No State . . . shall be liable under this title for costs or damages as a result of actions taken in response to an emergency created by the release or threatened release of a hazardous substance generated by or from a facility owned by another person. This paragraph shall not preclude liability for costs or damages as a result of gross negligence or intentional misconduct by the State or local government. For the purpose of the preceding sentence, reckless, willful, or wanton misconduct shall constitute gross negligence.

42 U.S.C. § 9607(d)(2).

MDNR's regulatory activities at the site were initiated in response to an environmental emergency posed by dire environmental conditions that were created by prior owners and that threatened to worsen. Further, the state's response was devoid of the misconduct or gross negligence that would strip MDNR of its immunity under section 107(d)(2). Instead, the agency's cleanup efforts, though only a partial remedy for the problems, were a good-faith attempt to eliminate or control an environmental disaster at a time when the agency's tools were severely limited. The court concludes that section 107(d)(2) immunizes MDNR from any liability under section 107(a) because the state's activities at the site were an appropriate response to an environmental emergency.

3. Section 107(a)(2) "operator" liability

As the court has detailed above, "operator" liability must be interpreted broadly in accordance with the language and intent of CERCLA. A state may thus be held liable as an operator in limited circumstances when it permits hazardous waste disposal to occur at a site over which it exercises dominion or control. *See Pennsylvania v. Union Gas Co.*, 491

U.S. 1, 105 L. Ed. 2d 1, 109 S. Ct. 2273 (1989); *CPC*, 731 F. Supp. at 787-89; *United States v. Stringfellow*, 31 Envtl. L. Rep. 1315 (D. 1990); *Hassayampa Steering Comm. v. Arizona*, 21 Chem. Waste Lit. Rptr (BNA) 322 (D. Ariz. 1990); *CPC*, 731 F. Supp. at 787-88. However, CERCLA liability does not arise when a state agency merely engages in regulatory activity at a site. *See United States v. Dart Indus. Inc.*, 847 F.2d 144, 146 (4th Cir. 1986); *United States v. Azrael*, 765 F. Supp. 1239 (D. Md., April 30, 1991); *CPC*, 731 F. Supp. at 788.

In this case, MDNR's regulatory response to severe environmental problems left by others does not constitute the possession or control necessary for a state to become an operator. Because MDNR's actions were regulatory and the agency did not assume possession or control over the site or its problems, the court concludes that MDNR cannot be held liable as an operator under section 107(a)(2).

Furthermore, as set forth above, section 107(d)(2) immunizes MDNR from any CERCLA liability because its efforts at the site were a response to an environmental emergency and its actions cannot be characterized as gross negligence or intentional misconduct. *See supra*, pp. 64-65.

For the reasons stated, MDNR is not liable as an operator under section 107(a)(2).

D. Conclusions of law regarding liability of Aerojet, Cordova/California, Cordova/Michigan

1. Claims against Aerojet and its subsidiaries

The United States, MDNR and CPC have advanced a variety of claims against Aerojet and its wholly owned subsidiaries, Cordova/California and Cordova/Michigan. The United States, MDNR and CPC allege that Cordova/Michigan and Aerojet are liable under section 107(a)(1) as the present owner and operator of the site. They further allege that Aerojet, Cordova/California and Cordova/Michigan are liable under section 107(a)(2) for having owned or operated the site during a period of disposal. CPC also alleges that Aerojet and Cordova/California may be held liable under section 107(a)(3) for the alleged arrangement with MDNR for

removal of contaminated groundwater.

2. Section 107(a)(1) "present owner" liability

Section 107(a)(1) holds the "present owner and operator of a . . facility" liable. Because it is undisputed that Cordova/Michigan has held legal title to the site since 1978, direct CERCLA liability clearly attaches to Cordova/Michigan under section 107(a)(1).

Aerojet's liability under section 107(a)(1) as a present owner turns on the question of whether piercing the corporate veil is appropriate. Aerojet cannot be held directly liable under section 107(a)(1) merely because its wholly owned subsidiary is the actual owner and operator of the facility. But as with section 107(a)(2) "owner or operator" liability, a parent corporation may be held liable as a "present owner and operator" if the circumstances justify disregarding the corporate form and attaching vicarious liability.

As noted above, the Sixth Circuit recently established that state law controls questions of when CERCLA liability should attach to parent corporations under common law theories and principles. *Anspec*, 922 F.2d at 1248. In this case, then, Michigan's veil-piercing standards apply. Under Michigan law, the court therefore must engage in a searching inquiry into all the unique facts and circumstances of the parent-subsidiary relationship at issue to determine whether their separate corporate existences should be disregarded. *See supra*, at pp. 55-57.

After considering all the evidence as well as controlling Michigan law on veil-piercing, the court concludes that this is an appropriate case to disregard the corporate form to serve the interests of justice. *See Lettinga*, 686 F.2d at 446; *Pettaway*, 116 N.W.2d at 790; *Montgomery*, 255 N.W. at 276.

Aerojet totally dominated Cordova/Michigan, creating a complete identity of interests between the parent and its wholly owned subsidiary. In both its corporate structure and function, Cordova/Michigan was a mere instrumentality of Aerojet, lacking any structural or actual independence in the operation of its business. The creation of Cordova/Michigan

as a separate subsidiary only served as an attempt to shield Aerojet from liabilities associated with the companies' integrated business at a facility where pollution problems were known to exist. Permitting Aerojet to escape CERCLA liability as the present owner and operator here would create an injustice to the parties who are entitled to recover their cleanup costs from the present owner and operator of a contaminated site. It would also do injustice to CERCLA itself, which aims to make parties that have actually owned or operated hazardous waste sites pay for their cleanup.

For these reasons, the court concludes that Aerojet is liable under section 107(a)(1) because, under Michigan's well-settled standards, veil-piercing is appropriate. *See Bodenhamer Bldg. Corp.*, 873 F.2d at 112 (6th Cir. 1989); *Lettinga*, 686 F.2d at 446 (6th Cir. 1982); *Pettaway*, 116 N.W.2d at 790; *Montgomery*, 255 N.W. at 276.

In reaching this conclusion, the court has considered the following facts to be particularly probative: 1) Aerojet was 100-percent shareholder of Cordova/California, which in turn wholly owned Cordova/Michigan; 2) Aerojet itself led the acquisition of the site, only incorporating its Cordova division after it became apparent that the site would be purchased, about 10 days before the signing of the stipulation and consent order; 3) the timing of the incorporation of Cordova subsidiaries reflected Aerojet's singular goal of insulating itself from liability; 4) the purpose of acquiring the site was to manufacture a product essential to Aerojet's Cordova division that would no longer be available from outside sources; 5) when manufacturing operations commenced at the site, Cordova/Michigan was part of an integrated business operation in which Cordova/Michigan supplied EI for use in manufacturing by Cordova/California; 6) the incorporation of Cordova/Michigan and Cordova/California were changes in form, not in substance, as former officers in Aerojet's Cordova division retained identical or similar jobs with the new subsidiaries; 7) Aerojet dominated the corporate hierarchy of both Cordova/Michigan and Cordova/California, where at least 20 Aerojet officials have held positions nearly identical to those they have held simultaneously with the parent company; 8) Cordova/Michigan and Cordova/California officials reported directly to Aerojet officials, who held

authority to give directions on day-to-day operations and policy matters; 9) the board of directors of Cordova/Michigan and Cordova/Michigan were non-functional and did not even convene in meetings; 10) Aerojet possessed total financial control over Cordova/Michigan and Cordova/California, which lacked of authority to maintain separate bank accounts; and 11) Aerojet arranged the assignment to Cordova/California of $25 million in worthless debt owed to it by Cordova/Michigan, which effectively eliminated $13 million owed by Aerojet to Cordova/California.

For the reasons stated, the court holds Cordova/Michigan and Aerojet liable under section 107(a)(1) as the present owner of the site.

3. Section 107(a)(2) "operator" liability

Because disposal of hazardous substances occurred at the site during the Cordova era[11], the liability of Cordova/California and Aerojet turns on whether the companies have "owned or operated" the facility, as with the court's determination of CPC's liability.

Cordova/California actually owned the site until it transferred the property to its newly created subsidiary, Cordova/Michigan, in November 1978. During this period, Cordova/California engaged in construction activities to prepare the facility for its chemical manufacturing operations, and the company engaged in the cleanup activities set forth in the stipulation and consent order signed with MDNR. Because Cordova/California owned the site from October 1977 to November 1978 during which hazardous waste disposal occurred, the court holds Cordova/California liable under section 107(a)(2).

Aerojet's liability under section 107(a)(2) must be determined under the same framework used in CPC's case, in which direct liability under the statute's "operator" language and vicarious liability through common law veil-piercing provide alternative theories for holding a parent corporation liable. *See supra,* pp. 50-57.

In assessing Aerojet's direct liability as an operator at

the site, the court must once again engage in a comprehensive inquiry into Aerojet's relationship with its subsidiaries and involvement with the site during the Cordova era. The court must determine whether the evidence has shown that Aerojet exerted power or influence by actively participating in and exercising control over the subsidiaries' business during a period of disposal of hazardous waste.

In light of the same facts that were probative in concluding Aerojet is liable under section 107(a)(1), the court concludes that Aerojet operated the site through active participation and pervasive control over the businesses of both Cordova/California and Cordova/Michigan.

As with CPC's involvement with Ott II, Aerojet's participation and control over the board, management and decision-making at Cordova/California and Cordova/Michigan shows that the parent operated the facility. Aerojet's conduct toward its subsidiaries extended well beyond the activities that are merely indicative of a parent's general oversight of a wholly owned subsidiary.

Accordingly, the court concludes the Aerojet is directly liable as an operator under section 107(a)(2).

Aerojet's direct liability under section 107(a)(2) makes it unnecessary to pierce the corporate veil under this provision, although the court has already concluded that disregarding the corporate form is appropriate in Aerojet's case for liability under section 107(a)(1). *See supra,* pp. 67-70.

For the reasons set forth above, Cordova/California and Aerojet are liable under section 107(a)(2).

4. Section 107(a)(3) "arranger" liability

As the court addressed above in concluding that MDNR could not be held liable as an arranger, no agreement existed between MDNR and either Aerojet or Cordova/California with respect to a remedy for the groundwater contamination that existed at the site at the time of the signing of the stipulation and consent order. *See, supra* at pp. 61-63.

Accordingly, the court concludes that Aerojet and Cordova/California are not liable under section 107(a)(3) for arranging for the disposal of hazardous waste.

5. Section 107(b)(3) innocent landowner defense

Aerojet, Cordova/California and Cordova/Michigan contend that any liability findings against them are precluded by section 107(b)(3). The section provides a limited defense to CERCLA's strict liability to those parties who are innocent purchasers. The provision states, in relevant part:

> There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by--
>
> . . . .
>
> > (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant . . . if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substances, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; . . .

42 U.S.C. § 9607(b)(3). The statute further defines "contractual relationship," whose existence can prevent use of the innocent purchaser defense, to include, without limitation:

> land contracts, deeds or other instruments transferring title or possession, unless the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility, and one or more of the circumstances described in clause (i), (ii), or (iii) is also established by the defendant by a preponderance of the evidence:
>
> > (i) At the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility.
> >
> > . . .

42 U.S.C. § 9601(35)(A).

To summarize, section 107(b)(3) provides a defense to liability in this case if a defendant shows that: 1) the hazardous contamination at the site was caused solely by other parties; 2) no direct or indirect contractual relationship existed between it and the parties responsible for contaminating the site; 3) it did not know or have reason to know of the contamination at the site at the time of purchase; and 4) it exercised due care with respect to the hazardous waste at the site.

Failure to prove any of these elements by a preponderance of the evidence precludes use of the innocent landowner defense. Aerojet, Cordova/California and Cordova/Michigan so fail. By acquiring the site from Story's bankruptcy trustee, Cordova/California had an indirect contractual relationship with a party responsible for contaminating the site. *See In re Sterling Steel Treating Inc.*, 94 Bankr. 924 (E.D. Mich. 1989). In addition, Aerojet and Cordova/California clearly knew about contamination at the site; in fact, Aerojet's obligations for cleanup were central to the negotiations over acquisition of the site. Aerojet and its subsidiaries also have failed to prove that the contamination was caused solely by others and that they exercised due care at the site. A hazardous substance used by Cordova/

Michigan in its manufacturing process is among those in the contamination at the site. In addition, the contamination created by prior owners has spread unabated off site, worsening the contamination problem, due at least in the part to the continued in operation of purge wells. These facts make the defense of section 107(b)(3) inapplicable to the liability of Aerojet, Cordova/California and Cordova/Michigan.

For these reasons, the court holds that section 107(b)(3) does not preclude the imposition of liability against Cordova/ Michigan, Cordova/California and Aerojet.

IV. CONCLUSION

Based on the findings of facts and conclusions of law set forth above, the court holds that CPC, Aerojet, Cordova/ California and Cordova/ Michigan are liable under CERCLA's section 107(a) for cleanup costs at the site, and that MDNR is not liable.

CPC is liable for claims brought under section 107(a)(2) as an operator of the site during a period of disposal.

MDNR is not liable for claims brought under section 107(a)(2) as an operator of the site during disposal or under section 107(a)(3) as an arranger for disposal of hazardous waste.

Aerojet is liable for claims brought under section 107(a)(1) as the present owner and operator of the site and under section 107(a)(2) as an operator of the site during disposal. Cordova/California is liable under section 107(a)(2) as an operator of the site during disposal. Cordova/Michigan is liable under section 107(a)(1) as the present owner and operator of the site and under section 107(a)(2) as an owner or operator during a period of disposal. Aerojet and Cordova/California are not liable under section 107(a)(3) as arrangers of disposal of hazardous waste.

/s/
Douglas W. Hillman
Senior Judge

Dated: AUG 27 1991

[1]By prior order of the court, this case has been separated into three phases: liability, remedy and insurance coverage. *See* Order, November 14, 1990. The court denied nine dispositive motions filed with respect to liability. *See* Bench Opinion, February 4, 1991 & *CPC Int'l, Inc. v. Aerojet-General Corp.*, 759 F. Supp. 1269 (W.D. Mich. 1991).

[2]The parties announced on the morning of trial that claims had been settled against another party, Arnold Ott. The court is currently awaiting presentation of a consent decree in accordance with CERCLA's settlement provisions, 42 U.S.C. § 9622 *et seq.*

[3]On April 30, 1991, the state filed a motion to dismiss based on eleventh amendment immunity all state-law claims brought against it by Aerojet, Cordova/California and Cordova/Michigan. On May 24, 1991, the court granted the motion in an opinion and order dismissing without prejudice claims for breach of contract, promissory estoppel, negligent misrepresentation and specific performance. *CPC International, Inc. v. Aerojet-General Corp.*, 764 F. Supp. 479, 482 (W.D. Mich. 1991).

[4]CERCLA liability, when it attaches is joint and several unless a defendant proves that the harm is divisible. *United States v. Northeastern Pharmaceutical & Chem. Co.*, 579 F. Supp. 823 (W.D. Mo. 1984), *aff'd in part and rev'd in cart on other grounds*, 810 F.2d 726 (8th Cir. 1986); *United States v. Ottati & Goss, Inc.*, 630 F. Supp. 1361 (D.N.H. 1985). However, under a provision of CERCLA added by Congress in 1986, a potentially liable party may seek contribution from any other potentially liable party for a share of the response costs. 42 U.S.C. § 9613(f)(1). In allocating response costs in a contribution action, a court has broad discretion to use equitable factors as it deems appropriate. *United States v. R.W. Meyer, Inc.*, 932 F.2d 568 (6th Cir. 1991)

In this case, the parties have advanced contribution claims against each other, seeking to reduce the amount of any liability that may attach. As previously indicated to the parties, the court is electing to defer until after the remedy phase findings of fact and conclusions of law with respect to allocation of liability. After the remedy phase, the court will

have heard evidence regarding the extent of the harm caused by hazardous waste disposal as well as the cost of the remedy. At that time, the court will be able to reach an equitable decision regarding how cleanup costs should be allocated among liable parties.

Deferring allocation decisions until after the remedy phase is consistent with the legislative history of section 113(f)(1). The House Committee that drafted the provision stated, "[*A*]*fter all questions of liability and remedy have been resolved*, courts may consider any criteria relevant to determining whether there should be apportionment." H.R. 253 (III), 99th Cong., 2d Sess. 19, (1985), *reprinted in* 1986 U.S. Code Cong. & Admin. News 3038, 3041-42 (emphasis added). *See also Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 667-68 (5th Cir. 1989) (favoring resolution of liability issues "before deciding the more complicated and technical questions of appropriate cleanup measures and the proportionate fault of liable parties").

[5]After the events at issue in this case, Corn Products Company changed its name to CPC International, Inc. For simplicity, "CPC" will be used in all of the court's references to the company.

[6]A number of courts have recognized that parent corporations may be liable in CERCLA cases under limited circumstances as past owners or operators of sites contaminated by their subsidiaries. *See, e.g., United States v. Kayser-Roth Corp.*, 724 F. Supp. 15 (D.R.I. 1989), *aff'd*, 910 F.2d 24 (1st Cir. 1990), *cert. denied*, 112 L. Ed. 2d 1045, 111 S. Ct. 957 (1991); *Mobay Corp. v. Allied-Signal, Inc.*, 761 F. Supp. 345 (D.N.J. 1991); *United States v. Nicolet, Inc.*, 712 F. Supp. 1193 (E.D. Pa. 1989); *In re Acushnet River & New Bedford Harbor*, 675 F. Supp. 22 (D. Mass. 1987); *Idaho v. Bunker Hill Co.*, 635 F. Supp. 665 (D. Idaho 1986); *Colorado v. Idarado Mining Corp.*, 1987 U.S. Dist. Lexis 14254 (D. Colo. 1987). *Contra Joslyn Mfg. Corp. v. T.L. James & Co., Inc.*, 696 F. Supp. 222 (W.D. La. 1988), *aff'd*, 893 F.2d 80 (5th Cir. 1990).

[7]*See, e.g.*, Aronsky & Fuller, "Liability of Parent Corporations for Hazardous Substance Releases under CERCLA", 24 U.S.F. L. Rev. 421 (1990); Allen, "Refining the Scope of CERCLA's

Corporate Veil-Piercing Remedy", 6 Stan. Envtl. L.J. 43 (1986-87); Note, "Liability of Parent Corporations for Hazardous Waste Cleanup and Damages", 99 Harv. L. Rev. 986 (1986).

[8]Courts have held that a number of persons who may not have held legal title to a hazardous waste facility may be liable for its cleanup. *See, e.g., Kaysor Roth,* 910 F.2d at 27 (parent corporations); *United States v. Fleet Factors Corp.,* 901 F.2d 1550 (11th Cir. 1990) (secured creditors); *United States v. South Carolina Recycling & Disposal, Inc.,* 653 F. Supp. 984 (D.S.C. 1984), *aff'd in part, vacated in part,* 858 F.2d 160 (4th Cir. 1988), *cert. denied,* 490 U.S. 1106 (1989) (lessees); *New York v. Shore Realty Corp.,* 759 F.2d 1032, 1052 (2d Cir. 1985) (corporate officers and shareholders).

[9]In *Joslyn v. Manufacturing Co. v. T.L. James & Co., Inc.,* 893 F.2d 80, 83 (5th Cir. 1990), *cert. denied,* 112 L. Ed. 2d 1098, 111 S. Ct. 1017 (1991), the Fifth Circuit held that a parent corporation only may be held liable under CERCLA under veil-piercing principles when the corporate form has been used as a sham. To the extent that Joslyn appears to hold that actual ownership is necessary for liability to attach under section 107(a)(2), the court disregards the case as contrary to the statute's plain language and purpose.

[10]During trial, the court denied CPC's motion to exclude evidence regarding successor liability. Trial tr. at 2458-60. The court based its decision in part on the pretrial order that expressly set forth as an unresolved issue "whether Ott-II is the corporate successor to Ott-I" and facts relevant to the successor question. *Id.* After trial, CPC filed a motion to strike proposed findings of fact and conclusions of law filed by the United States and MDNR that asserted CPC, not Ott II, is the corporate successor to Ott I. CPC argues that it had no notice of this alternative theory of liability. As noted above, the court has not reached successorship issues in concluding that CPC is liable under CERCLA section 107(a)(2). Therefore, CPC's motion is moot with respect to liability. Parties participating in the remedy phase of the trial may, with leave of the court, file additional findings of fact and conclusions of law on the successor corporation issue that may be relevant to the court's allocation decision.

Accordingly, CPC's motion is denied without prejudice.

[11] As the court has noted above and in its previous opinions, disposal of hazardous substances at the site occurred after 1977, as contaminants continued to spread into the ground and water and were carried off-site by the flow of groundwater. *See, supra,* p. 62; *CPC,* 759 F. Supp. at 1278; *CPC,* 731 F. Supp. at 789. In addition, hazardous substances used at the site during the Cordova period of ownership has been found in the contamination at the site, indicating that additional disposal occurred.

UNITED STATES OF AMERICA
DISTRICT COURT FOR THE WESTERN
DISTRICT OF MICHIGAN, SOUTHERN DIVISION

CPC INTERNATIONAL, INC.,

Plaintiff, Case No. G89-10503 CA

-vs-

AEROJET-GENERAL CORPORATION, CORDOVA CHEMICAL COMPANY, CORDOVA CHEMICAL COMPANY OF MICHIGAN, and MICHIGAN DEPARTMENT OF NATURAL RESOURCES,

Defendants

_____/

UNITED STATES OF AMERICA,

Plaintiff, Case No. G89-961 CA

-vs-

CORDOVA CHEMICAL COMPANY OF MICHIGAN, CORDOVA CHEMICAL COMPANY OF CALIFORNIA, AEROJET-GENERAL CORPORATION, CPC INTERNATIONAL, INC., and DR. ARNOLD C. OTT,

Defendants.

-and-

CPC INTERNATIONAL, INC.,

Third-party Plaintiff,

-vs-

COMMERCIAL UNION INSURANCE COMPANY, et al.,

Third-party Defendants.

_____/

ORDER DETERMINING LIABILITY
August 27, 1991, Filed

For the reasons set forth in the findings of fact and conclusions of law issued on today's date,

IT IS HEREBY ORDERED that Aerojet-General corporation and Cordova Chemical Company of Michigan are jointly and severally liable for response costs under CERCLA section 107(a)(1), 42 U.S.C. § 9607;

IT IS FURTHER ORDERED that CPC International Inc., Aerojet-General Corporation, Cordova Chemical Company and Cordova/Chemical Company of Michigan are jointly and severally liable for response costs under CERCLA section 107(a)(2), 42 U.S.C. § 9607;

IT IS FURTHER ORDERED that Aerojet-General Corporation, Cordova Chemical Company and Michigan Department of Natural Resources are not liable under CERCLA section 107(a)(3), 42 U.S.C. § 9607(a), and that all claims brought pursuant to section 107(a)(3) are DISMISSED;

IT IS FURTHER ORDERED that Michigan Department of Natural Resources is not liable under CERCLA section 107(a)(2), 42 U.S.C. § 9607, and that all claims against Michigan Department of Natural Resources are DISMISSED;

IT IS FURTHER ORDERED that final judgment shall be entered with respect to claims brought pursuant to 42 U.S.C. §§ 9607, 9613 following resolution of issues regarding remedy and allocation in Phase II of this litigation;

IT IS FURTHER ORDERED that a status conference shall be held for all parties still remaining in this case on **Friday, October 25, 1991**, at 10 a.m., Courtroom 682, Federal Building, Grand Rapids, Michigan, to discuss the schedule for the Phase II trial.

IT IS SO ORDERED.

/s/
Douglas W. Hillman
Senior Judge

Dated: AUG 27 1991

42 U.S.C. 9601(20)(A)

(20)(A) The term "owner or operator" means (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand. Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

42 U.S.C. § 9601(21)

The term "person" means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body.

42 U.S.C. 9607(a)

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section--

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for--

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

Supreme Court, U.S.
FILED
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Nos. 97-296, 97-454 and 97-464

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1996

UNITED STATES OF AMERICA (#97-454) and MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY (# 97-296),
Petitioners
v.
CPC INTERNATIONAL, INC., et al.
Respondents
and
CPC INTERNATIONAL, INC. (# 97-464),
Cross-Petitioner
v.
AEROJET-GENERAL CORPORATION, et al.,
Respondents

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF AEROJET-GENERAL CORPORATION, CORDOVA CHEMICAL COMPANY OF MICHIGAN AND CORDOVA CHEMICAL COMPANY OPPOSING PETITIONS

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RULE 29.6 STATEMENT

The parent company of Cordova Chemical Company of Michigan is Cordova Chemical Company. The parent company of Cordova Chemical Company is Aerojet-General Corporation. The parent company of Aerojet-General Corporation is GenCorp, a publicly traded company. The filing parties do not have non-wholly-owned subsidiaries, but Aerojet-General Corporation does hold less than 1% of the stock of Megabar Explosives Corp., a Utah corporation.

SUPPLEMENTAL STATEMENT OF THE CASE

This case involves the allocation of responsibility for pollution caused by prior owners and operators of a site now owned by Cordova Chemical Company of Michigan, a subsidiary of Cordova Chemical Company, which is in turn a subsidiary of Aerojet-General Corporation ("Aerojet"). Neither Aerojet nor any of its subsidiaries caused or contributed to any contamination at the site. All of the contaminants in the soil and groundwater of the site were deposited between 1957 and 1977, before Aerojet or its subsidiaries had any involvement whatsoever with the site.

Neither Aerojet nor its subsidiaries should bear any liability for the contamination caused by others at the site. The district court recognized that Aerojet's subsidiaries operated in an environmentally safe manner, and found as a matter of fact under Fed. R. Civ. P. 52 that:

> During their period of operations, Cordova/Michigan and Cordova/California neither buried waste nor dumped it onto the ground. No chemical waste was disposed into the unlined lagoons that had been used during the Ott I and Ott II eras. Before beginning chemical manufacturing, Cordova/Michigan repaired the equalization basin and chemical sewer system. When operating, Cordova/Michigan discharged chemical waste through off-site disposal or to a sewer that flowed to the Muskegon County treatment facility.

CPC Int'l Inc. v. Aerojet-General Corp., 777 F. Supp. 549, 556 (W.D. Mich. 1991) (U.S. Pet. App. 62a). The Court of Appeals noted the finding, *United States v. Cordova Chemical Co. of*

Michigan, 113 F.3d 572, 576-77 (6th Cir. 1997) (*en banc*) (U.S. Pet. App. 6a), and no party contested it on appeal. As the Court of Appeals stated: "[T]he release of hazardous substances appears to have been *caused* solely by the predecessors of [Aerojet and its subsidiaries]." *Id.* at 583, U.S. Pet. App. 23a-24a. Aerojet itself has never owned this site or conducted its operations there.

Aerojet and its subsidiaries initially became involved with the site in 1977 when Cordova Chemical Company purchased it from a federal bankruptcy trustee under a Stipulation and Consent Order with the State of Michigan. Under the Stipulation and Consent Order, Cordova Chemical Company agreed to contribute $600,000 to the State's cleanup efforts at the site, and the State of Michigan promised to release Cordova and hold it harmless from all potential liability for pollution left by the site's prior owners:

> 6. It is anticipated that said $600,000 will be sufficient to reimburse the Department of Natural Resources fully for all costs and expenses incurred by it in connection with its obligations hereunder and, in addition, to provide at least $100,000 towards the provision of an alternative water supply system to serve residents and commercial establishments whose water supply wells are or may become affected by the groundwater contaminants emanating from the Story Chemical Corporation property. The Cordova Chemical Company shall not have any liability in the event that said $600,000 is not in fact sufficient for the intended purposes nor shall it have any responsibility whatsoever in connection with the provision of any water supply system or potable water pending availability of an

> acceptable water supply system to said residents and commercial establishments.
>
> Cordova Chemical Company shall not have any responsibility or liability in connection with any other corrective actions which the Department of Natural Resources or any other governmental agency may hereafter deem necessary or advisable in connection with the contamination emanating from the Story Chemical Corporation property, including, without limitation, the creation, maintenance and operation of any purge wells.
>
> . . .
>
> 8. Compliance with this Consent Order shall constitute full satisfaction of all relief, civil or administrative, which might have been, or which otherwise might be obtained against Cordova Chemical Company for any contamination of groundwater or other pollution, injury, or damage, to the environment or otherwise, caused by acts or omissions of Story Chemical Corporation facilities, which acts, omissions or operations occurred prior to the effective date of this Consent Order, whether the contamination, pollution, injury or damage occurs prior to or after the effective date hereof.

See CPC, 777 F. Supp. at 565 (U.S. Pet. App. 86a-87a) (quoting from the Stipulation and Consent Order). Without this promise from the State of Michigan, Cordova Chemical Company would not have acquired the site.

The Michigan Court of Appeals has ruled that the Stipulation and Consent Order obligates the State to bear financial responsibility for any CERCLA liability assigned to Aerojet and its subsidiaries. *Cordova Chemical Co. v. Department of Natural Resources*, 212 Mich. App. 144, 536 N.W.2d 860 (1995). The Michigan Supreme Court has denied the State's request for leave to appeal. *See Cordova Chemical Co. v. State, Michigan Department of Natural Resources*, 453 Mich. 899, 554 N.W.2d 319 (1996). Accordingly, the question presented by the Petition of the United States and the Conditional Cross-Petition of CPC International is, for Aerojet, of primarily academic interest because ultimate financial responsibility for any CERCLA liability assigned to Aerojet will lie with the State.[1]

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[1] The State of Michigan's Petition seeks certiorari only with respect to the claims against CPC International, and not with respect to the claims against Aerojet and its subsidiaries. The State's Petition recognizes the reality that only CPC International, and not Aerojet, has a significant enough financial interest in the question to present the adversity necessary for proper presentation of the issue in this Court. Indeed, Aerojet's lack of a significant financial interest in the outcome of the claims against it may well lead this Court to deny the Petitions as moot insofar as they involve the claims against Aerojet. *Cf.* Stern, Gressman, Shapiro & Geller, *Supreme Court Practice*, § 18.2 at 710 (7th ed. 1993) ("If the controversy becomes academic by reason of changed circumstances, the Court's jurisdiction ceases and the case becomes moot."); 13A C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3533.2, at 241 n. 28 (2d ed. 1984) (collecting cases in which relief granted by another tribunal mooted an action).

REASONS FOR DENYING THE PETITIONS

1. This case does not present a sufficiently important question of federal law to warrant the attention and resources of the Court. The appropriate standard for determining the liability of a parent corporation as an "operator" under § 107(a)(2) of CERCLA is not an issue likely to arise with great frequency in the federal courts in the future. As the Petitioner acknowledges, "the United States does not routinely seek to hold parent corporations liable for conditions at a subsidiary's facility." U.S. Pet. at 26-27. Indeed, the courts of appeals have noted that it is only in unusual cases that a parent corporation may be subjected to such liability. "[I]t is obviously not the usual case that the parent of a wholly owned subsidiary is an operator of the subsidiary." *United States v. Kayser-Roth Corp.*, 910 F.2d 24, 27 (1st Cir. 1990); *see also Jacksonville Elec. Auth. v. Bernuth Corp.*, 996 F.2d 1107 (11th Cir. 1993) (same). Moreover, the frequency of such cases will be further minimized as the overall number of CERCLA cases in the federal courts decreases along with a decrease in the number of Superfund sites.[2]

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[2] The number of sites added annually to the National Priorities List ("NPL") has been steadily decreasing since the NPL's inception in 1983. From 1983-1990, the United States Environmental Protection Agency added an average of over 151 sites per year to the NPL. From 1991-1997, the annual average has declined to approximately 20. The following graph summarizes the annual data:

Even to the extent that such cases do continue to arise, existing decisions of the courts of appeals already provide a consistent answer to the abstract question presented by the Petitioners. The United States frames the question presented for review as "[w]hether a corporation that actively participated in, and exercised control over, the operations of a subsidiary may be held liable under CERCLA as an operator of the subsidiary's

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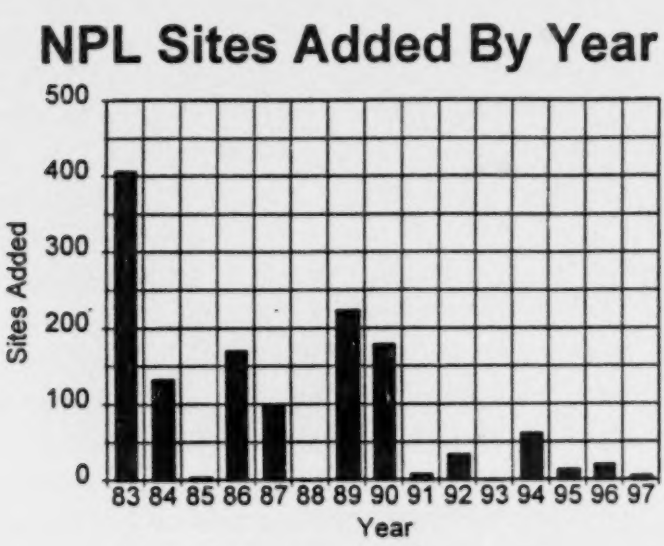

See Office of Solid Waste and Emergency Response, U.S. Environmental Protection Agency, Pub. No. 9320.7-061, Supplementary Materials: National Priorities List, Proposed Rule and Final Rule 25-29 (April 1997); 62 Fed. Reg. 50,442 (1997) (adding six sites to NPL in September of 1997). The trend is likely to continue. *See e.g.*, 114 Cong. Rec. S11336-01 (1995) (remarks of Senator Bond) (noting that the EPA's budget is decreasing and that Superfund will take its share of the cuts and thus needs to prioritize among NPL sites); *see also* S.8, 105th Cong., 1st Sess. § 802 (1997) (pending Superfund reauthorization bill which would cap the number of new NPL sites, decreasing to no more than 10 per year after the year 2000).

facility." U.S. Pet. at (I). Respondents respectfully submit that a careful review of the court of appeals decisions cited by the United States (U.S. Pet. at 22-26) reveals that all the circuits would answer the abstract question presented in the affirmative.[3] It is true that the language and theory used to apply the abstract principle to the particular facts of a case may vary from circuit to

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[3] The United States acknowledges this with respect to eight of the eleven circuits to address the issue. U.S. Pet. at 22-25 (citing holdings from the First, Second, Third and Eleventh Circuits and *dicta* from the Seventh, Eighth, Ninth and Tenth Circuits). In addition, the Sixth Circuit in this case recognized the validity of a direct theory of operator liability for parent corporations and specifically rejected the dissent's attempt to characterize the decision as holding otherwise. *See United States v. Cordova Chemical Co. of Michigan*, 113 F.3d 572, 579, 581 n. 5 (6th Cir. 1997) (*en banc*) (U.S. Pet App. 12a, 17a-18a). As the United States notes (U.S. Pet. at 25-26), it is not entirely clear how the Fifth Circuit would articulate its position on this point, but it is clear that the Fifth Circuit, like the other circuits, would impose CERCLA liability on a corporation whose active participation in and control over a subsidiary's operations was sufficient on the facts of a particular case to warrant disregard of the corporate form under applicable veil-piercing principles. Accordingly, the Fifth Circuit would also answer the question framed by the United States in the affirmative on the facts of an appropriate case. The Fourth Circuit, according to the United States, "has adopted a more expansive standard of operator liability," U.S. Pet. at 25, and so would obviously answer the abstract question framed by the United States in the affirmative. The District of Columbia Circuit has not addressed the issue and is unlikely to have the opportunity given the concentration of federally owned property and the absence of significant industrial property in the District. *See* 42 U.S.C. § 9613(b) (specifying venue for cost recovery actions in districts where the release of hazardous substances occurred or where the defendant resides, may be found, or has its principal office). There are no District of Columbia sites on the NPL. 40 C.F.R. § 300, Appendix B (1997).

circuit, but there does not appear to be any dispute among the circuits over the proposition that a company may under some circumstances bear liability for a subsidiary's facility.[4] This Court

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[4] Contrary to the claim of the United States (U.S. Pet. at 25), the Fourth Circuit's decision in *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, *cert. denied*, 506 U.S. 940 (1992), does not deepen the claimed conflict among the circuits over the treatment of parent companies under CERCLA § 107(a)(2). *Nurad* does not even deal with the operator liability of parent companies under CERCLA. The relevant portion of *Nurad* deals with the alleged operator liability of former tenants of a contaminated site and former officers of the corporate owner. *Id.* at 842-844. Moreover, in *Nurad*, the Fourth Circuit declined to impose operator liability on the facts of the case under an "authority to control" test of operator liability. Accordingly, any dispute over whether the appropriate test was "authority to control" or "actual control" was academic since neither test supported a finding of liability. *See Nurad*, 966 F.2d at 842 (affirming summary judgment for the former tenant based on the absence of authority to control waste disposal, and further noting the district court finding that the former tenants "never actively participated in the disposal of hazardous substances at the site").

The only other Fourth Circuit decision to address any form of CERCLA operator liability is *United States v. Carolina Transformer Co., Inc.*, 978 F.2d 832 (1992), a case dealing with the liability of officers and directors of a corporate owner and operator. (One of the officers and directors was also the sole shareholder of the company, but the court declined to analyze liability on that basis. *Id.* at 836.) *Carolina Transformer* articulated its decision using an "authority to control" standard, *id.* at 836-837, but the facts found by the trial court and referenced by the Court of Appeals may well have supported the imposition of liability on other grounds. Both individual defendants admitted they were responsible for what happened at the site, and one actually admitted that he "operated or otherwise controlled operations" at the site. *Id.* at 837. The district court findings referenced by the Court of Appeals, *id.*,

should not spend its time as linguistic police requiring that the circuits rigidly adhere to a particular verbal formula.

The United States suggests that the *en banc* decision of the Sixth Circuit is out of step with other court of appeals decisions[5] in its focus on the traditional corporate law concept of derivative liability through veil-piercing as a basis for assigning liability to a parent corporation. But the Sixth Circuit expressly refused to reduce parent corporation liability under CERCLA to a veil-piercing question in every case. To the contrary, just like the decisions of other courts of appeals (*see* U.S. Pet. at 22-25), the Sixth Circuit recognizes the possibility of direct operator liability for a parent company. In fact, the Sixth Circuit specifically stated at two points in its opinion that a parent corporation can be held directly liable as an operator where it "actually" or "directly" operated the facility at issue, either independently of the subsidiary

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detail more nefarious conduct including surreptitious operation of a subsidiary as a division of Carolina Transformer, a fraudulent attempt to divest Carolina Transformer of assets, and destruction of corporate records. *United States v. Carolina Transformer Co., Inc.*, 739 F. Supp. 1030, 1034-1035 (E.D.N.C. 1989). In such a case, the articulation of an "authority to control" standard was certainly not the controlling factor in the decision. Indeed, the United States says it does not support an "authority to control" standard, U.S. Pet. at 25, and so it would certainly not have brought the *Carolina Transformer* case in the absence of facts supporting liability on other grounds.

[5] U.S. Pet. at 22-25 (citing *United States v. Kayser-Roth Corp.*, 910 F.2d 24 (1st Cir. 1990); *Schiavone v. Pearce*, 79 F.3d 248 (2d Cir. 1996); *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209 (3d Cir. 1993); *Jacksonville Elec. Auth. v. Bernuth*, 996 F.2d 1107 (11th Cir. 1993)).

or as an actual co-operator alongside the subsidiary. *United States v. Cordova Chemical Co. of Michigan*, 113 F.3d 572, 579, 581 (6th Cir. 1997) (*en banc*) (U.S. Pet. App. 12a, 17a-18a). Moreover, the court's majority took the dissent to task for suggesting that it was holding otherwise, stating that "the dissent's characterization of our opinion as holding 'that a parent cannot, as a matter of law, be held directly liable under 42 U.S.C. § 9607(a)(2) as an "operator" of a facility owned by its subsidiary corporation' is mistaken." *Id.* at 581 n.5 (U.S. Pet. App. 17a). The Sixth Circuit simply did not find such a direct liability theory implicated by the claims and facts of this particular case. *Id.* This Court should not spend its time poring over a particular factual application of accepted legal principles.

In any event, the distinction Petitioner attempts to create between a standard based upon derivative liability through veil-piercing and one of direct liability is more theoretical than real. Commentators who have compared cases relying upon the traditional veil-piercing criteria with those purporting to apply a direct liability standard have found no difference in the result of the cases based upon this difference in approach. "[T]he liability of a parent corporation is the same regardless of whether liability is premised on traditional corporate law or direct statutory liability under CERCLA." Lynda J. Oswald & Cindy A. Schipani, *CERCLA and the "Erosion" of Traditional Corporate Law Doctrine*, 86 Nw. U. L. Rev. 259, 315 (1992); *see also* George W. Dent, *Limited Liability and Environmental Law*, 26 Wake Forest L. Rev. 151, 160 (1991) ("In theory, [direct liability] differs from liability under piercing . . . . In practice, however, the two can be hard to distinguish. The kind of participation in a CERCLA violation necessary to establish direct liability may differ little from the kind of involvement in the subsidiary's affairs

necessary to pierce the veil"). According to the commentators, "careful analysis of the fact patterns of these cases [purporting to apply a distinctly federal, direct liability standard] discloses that courts have simply held liable parties that could have been held liable under traditional corporate law doctrine." Oswald & Schipani, *supra*, at 236. Respondents respectfully submit that this Court should not devote its time to resolving an abstract question that has no real impact on the outcome of actual cases.

Because the question presented for review by the Petitioners is not frequently recurring in nature, because all the courts of appeal, including the Sixth Circuit, recognize the potential for both direct and derivative theories of liability,[6] and because the apparent difference between the direct and derivative standard of liability is of little practical import, this case does not warrant the attention and resources of this Court. Accordingly, the petitions should be denied.

2. Even if this Court decides to address the question presented by the Petitioners, it should do so only with respect to CPC International and not with respect to Aerojet. First, in Aerojet's case, unlike the case against CPC, resolution of the question presented in favor of the Petitioner should not change the outcome in favor of Aerojet. Even if Aerojet is deemed an "operator" under CERCLA § 107(a)(2), the judgment in favor of

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[6] The Fifth Circuit focused solely on derivative liability of a parent corporation through veil-piercing in *Joslyn v. T.L. James & Co.*, 893 F.2d 80 (5th Cir. 1990), but that court has more recently recognized the potential for both direct and derivative liability in the analogous case of a majority shareholder. *See Riverside Market Development Corp. v. International Building Products, Inc.*, 931 F.2d 327 (5th Cir. 1991).

Aerojet should still be sustained on other grounds. Moreover, even if Aerojet were ultimately found liable, the State of Michigan, and not Aerojet, would bear the ultimate financial burden of the ruling. *Cordova Chemical Co. v. Department of Natural Resources*, 212 Mich. App. 144, 536 N.W.2d 860 (1995). This dilutes the adversarial nature of the case against Aerojet necessary for careful adjudication of the issues. This also means that the taxpayers will bear financial responsibility for any liability ultimately imposed on Aerojet and its subsidiaries—precisely the result the United States says it seeks to avoid in bringing its Petition. U.S. Pet. at 27. Accordingly, a grant of certiorari in this case on the claims against Aerojet would not be an effective use of this Court's resources.

a. Aerojet has consistently argued that it cannot be liable under § 107(a)(2), regardless of whether it is deemed an "operator," because no disposal of hazardous substances occurred at the site during the tenure of its subsidiaries. Section 107(a)(2) imposes liability only on owners or operators "at the time of disposal of any hazardous substance." 42 U.S.C. § 9607(a)(2). Petitioners have asserted that the passive migration in groundwater of contaminants left by others amounts to "disposal." The Sixth Circuit did not have to address this issue because it held that Aerojet was not an operator.

Two courts of appeals have recently ruled, consistent with Aerojet's position, that passive migration is not "disposal" under CERCLA. *See ABB Industrial Systems Inc. v. Prime Technology, Inc.*, 120 F.3d 351 (2d Cir. 1997); *United States v CDMG Realty Co.*, 96 F.3d 706 (3d Cir. 1996). The Second Circuit succinctly summarized the numerous factors that support such a conclusion:

First, disposal is defined as "the discharge, deposit, injection, dumping, spilling, leaking, or placing" of hazardous chemicals so that they may enter the environment. 42 U.S.C. § 6903(3). None of these terms is commonly used to refer to the gradual spreading of hazardous chemicals already in the ground. *CDMG Realty Co.*, 96 F.3d at 714.

Second, current owners are liable, if, *inter alia*, there has been a "release" of hazardous substances. 42 U.S.C. § 9607(a). Unlike the definition of disposal, release is defined to include "leaching," *id.* § 9601(22), which is commonly used to describe passive migration, see *CDMG Realty Co.*, 96 F.3d at 715 & n.4 (quoting several law journals and cases). That Congress used the term leaching in the definition of release demonstrates that Congress knew that passive migration occurred but decided not to impose liability for it on prior owners. *Id.*

Third, CERCLA provides an "innocent owner" defense. *See* 42 U.S.C. §§ 9607(b)(3), 9601(35); *Westwood Pharmaceutical v. National Fuel Gas Dist. Corp.*, 964 F.2d 85, 89-91 (2d Cir. 1992). To qualify for that defense, a defendant must establish, *inter alia*, that it acquired the site "after the disposal" of hazardous chemicals. 42 U.S.C. § 9601(35)(A). If "disposal" included the gradual spreading of hazardous chemicals spilled before the defendant acquired the site, the innocent owners defense would hardly ever be available. *CDMG Realty Co.*, 96 F.3d at 716. Once hazardous chemicals are in the ground, they usually

> spread, and therefore, there would almost never be an identifiable period "after the disposal." *Id.* Congress would not intentionally create a useless defense. Thus, we interpret the word "disposal" as limited to spilling, discharging, leaking, etc., and not to passive migration. *See Id.*
>
> . . . .
>
> Finally, the *CDMG Realty Co.* Court reasoned that its interpretation was consistent with CERCLA policy. One of CERCLA's goals is to "force polluters to pay the cost associated with their pollution." *CDMG Realty Co.*, 96 F.3d at 717; *see also B.F. Goodrich*, 99 F.3d at 514 (CERCLA's purposes include "assuring that those responsible for any damage, environmental harm, or injury from chemical poisons bear the costs of their actions"). If a person merely controlled a site on which hazardous chemicals have spread without that person's fault, that person is not a polluter and is not one upon whom CERCLA aims to impose liability.

ABB, 120 F.3d at 358-59; *see also* Note, *The Case Against Intermediate Owner Liability Under CERCLA for Passive Migration of Hazardous Waste*, 93 Mich. L. Rev. 609 (1994).[7] Accordingly,

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[7] *But cf. Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837 (4th Cir. 1992) (leaking from tanks that were deposited prior to the defendant's ownership constitutes "disposal" subjecting the defendant to CERCLA liability). *Nurad* did not address precisely the same question presented by the facts of this case. In *Nurad*, additional contaminants entered the environment from leaking containers. 966 F.2d at 846 (former owners held property "at a time when the mineral spirits were 'leaking' from the tanks"). In this case, all of the contaminants at issue were

even if the Sixth Circuit's "operator" analysis were reversed and Aerojet were deemed to be an operator, no liability would attach to Aerojet since the passive migration of contaminants left by others does not constitute disposal within the meaning of the statute.

b. Even if the operator liability and disposal issues were resolved against Aerojet, it would still not be subject to liability because Aerojet and its subsidiaries qualify for the third party defense available under § 107(b)(3) of CERCLA for parties that neither caused the contamination nor had a disqualifying contractual relationship with those who did. Section 107(b)(3) provides that:

> (b) There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by . . .
>
> (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly with the defendant . . . if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned,

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already in the soil and groundwater of the site before Aerojet's subsidiary acquired the property in 1977. The question, then, is whether natural migration of contaminants already released into the environment amounts to new "disposal." As the Second Circuit noted in *ABB*, such a broad reading of the term would effectively eliminate other provisions in the statute.

> taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions. . . .

42 U.S.C. § 9607(b). Aerojet and its subsidiaries meet each of the requirements of this defense because Aerojet and its subsidiaries (1) did not cause contamination at the site; (2) did not have a disqualifying contractual relationship with those who did; and (3) did conduct themselves reasonably at the site consistent with the Stipulation and Consent Order with the State of Michigan. The Sixth Circuit has instructed the trial court to reconsider the applicability of this defense on remand. *United States v. Cordova Chemical Co. of Michigan*, 113 F.3d 572, 583 (6th Cir. 1997) (*en banc*) (U.S. Pet. App. 23a-24a). Accordingly, even if all other issues were resolved adversely to Aerojet, the judgment of the Sixth Circuit in favor of Aerojet should still stand.

c. Petitioner asserts that an important purpose of CERCLA is to relieve the taxpaying public of the burden of bearing cleanup costs at polluted sites. Indeed, Petitioner asserts that "this case illustrates precisely why" parent corporations should be subject to liability as operators in some cases—to avoid situations in which "the general public must assume the costs of cleanup." U.S. Pet. at 27. But the facts of this case belie such a characterization as to Aerojet because a taxpaying public will ultimately bear the cost even if Aerojet is deemed liable. The Michigan Court of Appeals has ruled that the State of Michigan must reimburse Aerojet and its subsidiaries for any CERCLA liability they incur. *Cordova Chemical Co. v. Department of Natural Resources*, 212 Mich. App.

144, 536 N.W. 2d 862 (1995), *lv. denied*, 453 Mich. 899, 554 N.W.2d 319 (1996). Thus, it is taxpayers who will bear ultimate financial responsibility for any liability assigned to Aerojet and its subsidiaries. As such, review by this Court of the claims against Aerojet cannot advance the very policy Petitioner claims to advance with its Petition.

3. This Court should in any event deny the Conditional Cross-Petition of CPC International because CPC has no proper interest in seeking review of a judgment in favor of Aerojet and against the State of Michigan that the State itself is content to accept. A party must generally assert only its own legal rights, not those of other parties. *See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474-75 (1981); *Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984). A party must also have a sufficient personal stake in the outcome of a controversy to warrant its invocation of the Court's jurisdiction. *See Warth v. Seldin*, 422 U.S. 490 (1975). CPC's only asserted interest in seeking review of this issue as to Aerojet is to advance its claim for contribution against Aerojet. But CPC chose to abandon that claim in this litigation based on a partial settlement with Aerojet. *See* Stipulation and Order (April 15, 1992) at ¶ 6, Mich. Pet. App. 83a ("Since Aerojet-General Corp. and CPC International Inc. have reached a voluntary settlement that allocates past response costs between them, this Stipulation and Order constitutes a disposition of all legal and factual issues before the Court in phase II of the consolidated action."). Accordingly, the district court dismissed all claims between CPC and Aerojet in this case without prejudice. *See* Final Judgment (September 10, 1992) at ¶ 8 (Mich. Pet. App. 80a-81a). CPC may now regret its earlier decision to abandon its contribution claims in this case, but that regret does not create a proper basis for this Court to review a

judgment between Aerojet and the State of Michigan that both Aerojet and the State are content to accept.

CONCLUSION

The Petition for Writ of Certiorari filed by the United States (No. 97-454) should be denied. Alternatively, even if the Court decides to grant this petition, it should do so only with respect to the claims against CPC. The Court should further deny the Conditional Cross-Petition of CPC (No. 97-464).[8]

November 10, 1997

Respectfully submitted,

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[8] No relief is sought against Aerojet or its subsidiaries in the Petition of MDNR (No. 97-296).

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Doc #254560-111097I207

Supreme Court, U.S.
FILED
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(3) (5)

Nos. 97-296 and 97-454

In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

CPC INTERNATIONAL INC.,
ET AL., RESPONDENTS

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY,
PETITIONER

v.

CPC INTERNATIONAL INC., RESPONDENT

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR RESPONDENT CPC INTERNATIONAL INC. IN OPPOSITION

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3888

QUESTION PRESENTED

Whether, on the facts of this case, CPC International Inc. participated so pervasively in the day-to-day management of the chemical manufacturing plant owned and operated by its wholly-owned subsidiary that CPC "operate[d]" the subsidiary's "facility" within the meaning of Section 107(a)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9607(a)(2).

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties listed in the captions, the respondents in No. 97-454 are Aerojet-General Corporation, Cordova Chemical Company of Michigan, and Cordova Chemical Company. The petitioner in No. 97-296, the Michigan Department of Environmental Quality, formerly was known as the Michigan Department of Natural Resources. See No. 97-296 Pet. ii. For consistency with the petition in No. 97-296 and the proceedings in the courts below, we will continue to refer to the State agency as the "MDNR."

Respondent CPC International Inc. has no parent companies and has the following nonwholly owned subsidiaries:

Circulo Esmeralda, S.A. de C.V.
Corn Products Co. (India) Ltd.
Maghreb Alimentation S.A.
Maizena Brasil S.A.
Productos Modificados, S.A. de C.V.
Refinacoes de Milho, Brasil Ltda.
Refinerias de Maiz SAICF
S.B. Penick del Ecuador S.A.

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BRIEF FOR RESPONDENT CPC INTERNATIONAL INC. IN OPPOSITION

This Court has repeatedly declined to review the inherently fact-bound question whether a particular corporate or individual owner of a corporation should be subjected to "operator" liability under CERCLA where the owned corporation operated a "facility" at which hazardous waste is located.[1] The petitions in this case present no reason for the Court to depart from that prudent and consistent course. Moreover, as the decreasing frequency of the petitions indicates, the issue is losing rather than gaining importance, further reducing the need for this Court to sort out the facts of this case.

STATEMENT

This case involves the allocation of liability under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.* ("CERCLA"), for the cleanup of a site near Muskegon, Michigan. Four separate successive owners manufactured chemicals at the Muskegon site: Ott Chemical Co. ("Ott I"), from 1957 to 1965; Ott Chemical Co. ("Ott II"), a wholly-owned subsidiary of respondent CPC International Inc., from 1965 to 1972; Story Chemical Co., from 1972 until it went bankrupt in 1977; and two wholly owned subsidiaries of cross-respondent Aerojet-General Corp. — Cordova Chemical Co. ("Cordova/California") and Cordova Chemical Co. of Michigan ("Cordova/Michigan") — from 1977 to 1986. U.S. App. 3a-4a.[2]

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[1] See *Livingstone* v. *Donahey*, No. 93-428, granted, vacated and remanded for reconsideration of attorney fee award, 512 U.S. 1201 (1994); *Riverside Market Ltd. Partnership* v. *Prescott*, No. 91-458, cert. denied, 502 U.S. 1004 (1991); *Joslyn Manufacturing Co.* v. *T.L. James & Co.*, No. 89-1973, cert. denied, 498 U.S. 1108 (1991); *Powerline Supply Co.* v. *T.L. James & Co.*, No. 90-69, cert. denied, 498 U.S. 1108 (1991); *Kayser-Roth Corp.* v. *United States*, No. 90-816, cert. denied, 498 U.S. 1084 (1991).

[2] "U.S. App." refers to the appendix to the petition in No. 97-454.

A. Factual Background

1. Ott I manufactured a variety of synthetic organic chemicals at its Muskegon facility. See U.S. App. 63a. In 1963, the chairman of CPC (then known as Corn Products Company), which specialized in wet-milled corn products, joined the Ott I board. *Id.* at 64a. In 1965, a subsidiary of CPC purchased the assets of Ott I and then adopted the Ott name. *Id.* at 65a.

Ott II continued Ott I's operations at the Muskegon site (U.S. App. 66a); later, it also operated a chemical manufacturing plant in Charlotte, North Carolina. *E.g.*, C.A. App. 2329, 2334, 2340-2343. As the district court found, "[t]he officers of Ott II remained identical to the officers of Ott I[.] * * * Ott II continued to manufacture substantially the same products. Ott II continued to sell products to nearly all of Ott I's customers. Ott II continued to employ most of the same personnel as Ott I. And Ott II continued the same chemical manufacturing operation at the same facility." U.S. App. 66a.

The Ott II board of directors was "an active board during CPC's period of ownership, continuing the tradition established in the Ott I era of functioning in an engaged, participatory manner." U.S. App. 67a. In particular, "[t]he board established policies and goals for the company. It also regularly received reports and presentations from Ott II officers, including accounts of mounting problems with waste disposal." *Ibid.*

Arnold Ott, president of Ott I, and James Eiszner, a vice president, assumed duties for CPC while retaining their positions with Ott II. U.S. App. 68a. Ott remained closely involved with the company that bore his name. He remained president of Ott II through 1966 and was its CEO and chairman of the board through 1969. *Id.* at 68a, 70a, 72a. Ott remained on the Ott II board after he resigned from CPC in 1969 (C.A. App. 731) and continued to advise his successors in management — actions that the district court attributed to his former employer, CPC. See U.S. App. 73a.

CPC's acquisition of Ott I typified the 1960s fashion for conglomerate acquisitions. CPC acquired a number of companies in businesses that were unrelated to wet-milled corn products, CPC's core business. The acquired companies were loosely federated within the Corn Products Development Company ("CP Development"), a division of the parent corporation. U.S. App. 70a. CP Development oversaw six CPC subsidiaries (including Ott II) and a research center. C.A. App. 3325-3326, 3331-3332, 3419-3420. CP Development reviewed Ott II's financial performance, projections, and large capital expenditure requests. U.S. App. 72a-73a. Like any substantial investor, CP Development "exert[ed] pressure [on Ott II] to generate more profits and enhance performance." *Id.* at 72a.

Unsurprisingly, some officers of Ott II, including Ott and Eiszner (who succeeded Ott as president of Ott II), held positions in the division that supervised Ott II; Ott was the first president of CP Development. U.S. App. 72a. Eiszner's successor as president of Ott II, Beverly Warner, moved in the other direction from president of CP Development to CEO of Ott II. *Ibid.* There was *no* evidence, however, that CP Development and Ott II were in any sense a single integrated enterprise.

Like virtually all parent corporations, CPC placed some employees on its subsidiary's board of directors. U.S. App. 67a-68a. If Ott I officers Ott and Eiszner are counted as CPC representatives, CPC employees at times made up a majority of the Ott II board. *Ibid.*; see C.A. App. 736-737. Only one of the CPC officers who served on Ott II's board was also a director of CPC (*id.* at 731-732, 736-737), however, and there was no evidence that CPC used its employment relationship with some Ott II directors in order to control Ott II's corporate policy.

To the contrary, Ott II corporate officers set the day-to-day operating policies for the company without any supervision or approval by CPC. See U.S. App. 69a. Until 1970, those officers included no CPC employees not drawn from Ott I. C.A. App. 738-740. Indeed, minutes from a 1967 Ott II board meeting

indicate that, according to CPC's chairman, the parent company did "not want[] to 'meddle' with" Ott II. C.A. App. 2210.

Actual practice accorded with this policy. The district court found that "[t]he Ott II management formulated and implemented the company's day-to-day operating policies" across the whole range of activities, "including sales, marketing, advertising, the purchase of raw materials, research and development, hiring and personnel policies, capital expenditures, manufacturing, and," significantly for present purposes, "environmental matters." U.S. App. 69a.

2. Ott I discharged most of its industrial waste into seepage lagoons. See U.S. App. 60a-61a. Ott II took several steps to improve the waste disposal system. For example, it added and then redeveloped purge wells to confine and remove contaminated ground water, and it built an in-plant waste collection system and an equalization basin. C.A. App. 2228-2234. Ott II's state-of-the-art efforts to control its waste disposal were the subject of a technical journal article that concluded that the new system "achieved the goal of preserving the environment." Burt, *The Use, Abuse and Recovery of a Glacial Aquifer*, GROUND WATER, Jan.-Feb. 1972, at 65, 65.

CPC was not involved in the design or implementation of these projects. A CPC employee, G.R.D. Williams, attended a single meeting between Ott II personnel and Michigan Water Resources Commission staff in 1966. U.S. App. 75a. Uncontradicted testimony showed that Williams "had absolutely no responsibility or no authority within the Ott Chemical Company," but was "basically * * * a clerical figure who was keeping a record of all of the pol[l]ution control problems existing" in CPC and its subsidiaries. C.A. App. 2893-2894. Williams "had nothing to do with the development of [Ott II's] control of waste," but "was given copies after the fact of decisions which [Ott II] had reached." *Id.* at 2895-2896, 2914-2915. In CPC's view, Williams "could consult and he could advise, but he couldn't require anybody in any location to do anything." *Id.* at 3269; see also *id.* at 2995-2996.

3. After CPC had agreed in principle on December 31, 1971, to sell Ott II to the Story Chemical Company, CP Development essentially acted as Story's agent in overseeing Ott II. U.S. App. 72a, 74a. Although the day-to-day internal management of Ott II was unchanged (C.A. App. 3356), Ott II managers were "advised not to implement any changes in activity" without consulting CPC (U.S. App. 74a) so as to prevent the dissipation of assets for which Story had agreed to pay a set price (C.A. App. 3355).

Story acquired Ott II in 1972. U.S. App. 78a. Within two years, Story no longer used the purge well system regularly, accelerating the contamination of the property. *Ibid.*

The Michigan Department of Natural Resources (MDNR) turned its attention to the Muskegon site after Story's bankruptcy in 1977. U.S. App. 79a. MDNR sought a buyer for the Muskegon site that could contribute to the cleanup process. *Id.* at 81a. Aerojet, which sought a facility to make a chemical for its Cordova Chemical Company division, negotiated with MDNR and the bankruptcy trustee. *Id.* at 81a-82a. Aerojet incorporated the Cordova Chemical division as Cordova/California in October 1977; Cordova/California purchased Story's assets shortly thereafter, entering into a side agreement with MDNR. *Id.* at 82a-83a. Cordova/California incorporated Cordova/Michigan as a subsidiary in 1978, and transferred the Muskegon plant to the subsidiary. *Id.* at 94a.

B. Proceedings Below

1. Several CERCLA claims, counterclaims, and cross-claims were raised in a consolidated action in the United States District Court for the Western District of Michigan. In 1991, the district court found CPC, Aerojet, Cordova/California, and Cordova/Michigan jointly and severally liable for cleanup costs at the site. U.S. App. 128a-129a.

The district court held that CPC was liable as an "operator" of the Muskegon facility under Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2). In the court's view, "section 107(a)(2)

liability may attach to a parent corporation in two ways": direct liability, or liability through common law veil-piercing. U.S. App. 103a-104a. The court concluded that the statutory terms "owned or operated" somehow "forge[d] a new, middle ground" of liability (*id.* at 107a) — a "middle ground" that did not accord the full protection of the corporate form to any but the most passive parent corporations.

The district court defined its "new, middle ground" in these terms: "a parent corporation is directly liable under section 107(a)(2) as an operator" whenever "it has exerted power or influence over its subsidiary by actively participating in and exercising control over the subsidiary's business during a period of disposal of hazardous waste." U.S. App. 107a. Applying that test to the facts of this case, the court found CPC liable because "the evidence shows active participation and control by CPC in Ott II affairs." *Id.* at 111a.[3]

The district court recognized that its decision was *ad hoc* and fact-bound: "In the final analysis, each case must be decided on its own unique facts and circumstances." U.S. App. 108a. The court rested its conclusion principally on the presence of CPC employees at the highest levels of Ott II — most notably, Ott and Eiszner, who continued to have close involvement with Ott II after they assumed responsibilities at CPC. *Id.* at 70-71a, 111a. See MDNR Pet. 18. The court assumed that any officer or director of Ott II who also held a position at CPC performed his Ott II duties not as an agent of Ott II but as an agent of CPC. The court also noted that CPC had contributed cash to Ott II's expansion, had to approve large expenditures approved by Ott II's board, and on occasion had shared business and legal resources with Ott II (see U.S. App. 76a-77a) — although in the same breath the district court claimed that "monitoring of a subsidiary's financial perfor-

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[3] In light of this conclusion, the district court did "not reach the question of whether CPC should be held liable under CERCLA through common-law veil-piercing" (U.S. App. 112a).

mance, consolidation of corporate business matters such as accounting and legal work, and cooperation between the subsidiary and the parent in research" were *not* activities that supported liability. *Id.* at 108a.

The district court focused on the presence of persons with CPC ties in Ott II's upper management generally, rather than any CPC corporate involvement in operations or waste disposal at the Muskegon facility. U.S. App. 65a-78a, 110a-112a. The court also identified three ways in which CPC "actively participated in Ott II environmental matters." U.S. App. 74a. First, the court attributed to CPC as an entity all discussions by the Ott II board and management of Ott II waste disposal, because some Ott II officers and directors also held positions with CPC. *Ibid.* Second, the court rested heavily on G.R.D. Williams's participation along with Ott II management in internal discussions and in meetings with outside persons involving Ott II environmental matters. *Id.* at 74a-76a. Finally, the court noted that a CPC attorney negotiated the use of a county wastewater treatment system for Ott II. *Id.* at 76a.

The district court also held that Aerojet was liable as an "operator" of the Muskegon facility. The court concluded that, "[a]s with CPC's involvement with Ott II, Aerojet's participation and control over * * * Cordova/California and Cordova/Michigan shows that the parent operated the facility." U.S. App. 124a. In addition, the court held that Aerojet was separately liable as the "present owner" of the facility, finding a basis under Michigan law to pierce Aerojet's corporate veil and charge the parent with the obligations of Cordova/Michigan, which owns the Muskegon site. See 42 U.S.C. § 9607(a)(1).

2. The Sixth Circuit, sitting *en banc*, reversed the judgments against CPC and Aerojet under Section 107(a)(2). U.S. App. 1a-24a. Contrary to the district court, the court of appeals did not believe that "operator" liability could be imposed on a parent corporation based solely on an *ad hoc* analysis of "the degree of control exerted by the parent over its subsidiary."

U.S. App. 18a. Certainly, "the degree to which [a parent] controls its subsidiary and the extent and manner of its involvement with the facility" could render a parent liable as an operator of a facility operated by its subsidiary. *Id.* at 15a. But the Sixth Circuit did not find anything in the statutory definition of "operator" — "any person * * * operating such facility" — or elsewhere in CERCLA that "warrants the invocation by courts of vague, expansive concepts, such as the district court's 'new, middle ground,' which threaten the efficacy of time-honored limited liability protections afforded by the corporate form." *Id.* at 13a-14a.

Accordingly, the Sixth Circuit held that a parent may be held liable under Section 107(a)(2) only (a) "where the parent directly operates the facility itself, either independently of its subsidiary, or as an actual co-operator alongside the subsidiary" or (b) "by piercing the corporate veil" under state law (U.S. App. 17a; see *id.* at 15a). Applying that standard, the court of appeals held that there was no support in the record for imposing "operator" liability on either CPC (*id.* at 16a-18a) or Aerojet (*id.* at 22a). With respect to CPC, the court of appeals noted that the factors on which the district court relied revealed only "a parent that took an active interest in the affairs of its subsidiary." *Id.* at 17a.

ARGUMENT

Petitioners invite this Court to embroil itself in an intensely fact-bound inquiry about what activities by a parent corporation render it liable under CERCLA as an "operator" of a hazardous waste facility owned and operated by the subsidiary corporation. All courts of appeals agree that there is a line over which a parent corporation may not cross without incurring liability as an "operator" of its subsidiary's facility. As the Sixth Circuit put it, "whether the parent will be liable as an operator depends upon * * * the degree to which it controls its subsidiary and the extent and manner of its involvement with the facility." U.S. App. 15a. Each court of appeals ultimately sifts through the

totality of the circumstances to decide whether a parent company "operates" the facility that its subsidiary "operates."

The question presented here does not merit this Court's attention. This Court prudently has refrained from involving itself in the twists and turns of the lower courts' application of their fact-specific analyses, long tolerating the differences in phraseology between the First and Fifth Circuits. The United States acknowledges that the question of parent-subsidiary liability does not recur frequently. CERCLA issues generally are diminishing in importance as fewer covered sites are identified and as the 1980 enactment of CERCLA — which first warned companies, although not parent companies of legitimate subsidiaries, that they might be federally liable for all persistent hazardous waste — fades further into the past.

Moreover, the Sixth Circuit, like the Fifth Circuit years ago, correctly held that the word "operates" did not express congressional intent to override the existing well-settled law governing the liability of parent corporations for actions of their subsidiaries. In any event, CPC would not be liable even under a principled application of the "pervasive control" test for which petitioners seem to argue. Because further review by this Court is not warranted, the petitions should be denied.

I. WHETHER CPC "OPERATED" THE MUSKEGON FACILITY PRESENTS A FACT-BOUND ISSUE NOT WARRANTING REVIEW

A. The courts of appeals repeatedly have recognized that "an inherently fact-intensive inquiry * * * involving consideration of the totality of the circumstances presented" underlies every "determination whether a corporation has exerted sufficient control" of its subsidiary "to warrant imposition of operator liability." *Lansford-Coaldale Joint Water Authority* v. *Tonolli Corp.*, 4 F.3d 1209, 1222 (3d Cir. 1993); see also, *e.g.*, *Schiavone* v. *Pearce*, 79 F.3d 248, 255 (2d Cir. 1996). Not only is the placement of a specific set of intercorporate relations on a spectrum ranging from legitimate to excessive control neces-

sarily "fact-laden," *John S. Boyd Co.* v. *Boston Gas Co.*, 992 F.2d 401, 408 (1st Cir. 1993), but this case remains in an interlocutory posture. The Sixth Circuit remanded for further evaluation of the liability of Cordova/California and Cordova/ Michigan (see U.S. App. 22a-24a), which precludes the entry at this juncture of any "judgment adjudicating all the claims and the rights and liabilities of all the parties" (Fed. R. Civ. P. 54(b)).

It is important to bear in mind what questions are *not* presented here. This case does not involve the liability of individuals for waste disposal they personally performed or ordered performed while acting as officers of a company. Likewise, there is no dispute among the courts of appeals that operator liability attaches to a parent corporation that "directly operates [a] facility itself, either independently of its subsidiary, or as an actual co-operator alongside the subsidiary" (U.S. App. 17a), as could occur if the subsidiary were engaged in a similar business such that the parent could take advantage of the subsidiary's facility, or if the subsidiary owned real estate or other assets that the parent used in its business. Thus, MDNR flatly misrepresents the holding of the Sixth Circuit as precluding all "operator" liability on the part of a parent corporation at a facility owned and operated by a subsidiary unless "the requirements to pierce the corporate veil under state law are met." MDNR Pet. 6.

Upon examination, petitioners' chief complaint seems to be that the Sixth Circuit, unlike the district court, did not attribute all of Ott II's actions to CPC because the court of appeals did not implicitly assume that Ott II officers and directors who had ties to CPC acted as *CPC's* agents whenever they acted in their capacities within *Ott II*. But in assuming instead that Ott II officers and directors acted in their capacities within Ott II, rather than as infiltrators for CPC, the Sixth Circuit merely followed the well-established presumption that, unless the evidence shows that the individuals "favor[ed] the interests of one corporation while sacrificing or betraying those of the other," the individuals' acts taken in the course of managing the

subsidiary are by and for the benefit of the *subsidiary*, not instances of manipulation by the *parent* in disregard of the subsidiary's interest. *Western Pacific R.R. Corp.* v. *Western Pacific R.R. Co.*, 197 F.2d 994, 1000 (9th Cir. 1951) (emphasis deleted), order denying reh'g en banc vacated and remanded, 345 U.S. 247, reh'g denied on remand, 206 F.2d 495 (9th Cir.), cert. denied, 346 U.S. 910 (1953). See also, *e.g.*, *Pullman's Palace Car Co.* v. *Missouri Pacific Ry.*, 115 U.S. 587, 596 (1885); *Edwards Co.* v. *Monogram Industries, Inc.*, 730 F.2d 977, 985-986 (5th Cir. 1984) (en banc); *Fisser* v. *International Bank*, 282 F.2d 231, 238 (2d Cir. 1960); *Wiseman* v. *United Dairies*, 324 Mich. 473, 37 N.W.2d 174, 182 (1949).

Petitioners can point to nothing in CERCLA that purports to alter that rule of law. When petitioners' erroneous assumption is disregarded — an assumption that would effectively transform into acts of a parent all acts approved by directors or officers of a subsidiary who have fiduciary or employment duties to the parent-shareholder — the limited significance of the decision below fades still further.

B. Petitioners try to inflate the significance of this case by mischaracterizing the facts found by the district court, as well as the Sixth Circuit's response to those findings and their adequacy. For example, MDNR (Pet. 18) claims that "CPC was directly involved in the operation at the [Muskegon] facility"; the United States likewise asserts (Pet. 10) that the district court found that "CPC * * * had directly participated in the operation of the Muskegon site." But the district court's findings (even if they could have survived clear-error review) did not go so far, but rather concentrated on CPC's supposed participation in the upper management of Ott II rather than the operations at the Muskegon site.[4] MDNR claims (Pet. 18 n.4) that the district court "found that CPC did, in fact, control * * * waste disposal

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[4] In the court of appeals, CPC pointed out the lack of record support for many of the district court's findings. See generally CPC Opening C.A. Br. 5-38.

at the site"; the district court made no such finding, however, and the facts it did find would not have supported that conclusion. See U.S. App. 74a-76a.

The United States also claims (Pet. 17) that "the district found that [CPC] had placed its own high level officers in key management positions of its subsidiary specifically to ensure that CPC would actively participate in and maintain close control over the day-to-day running of the subsidiary's business at the Muskegon site." But the blanket citations the United States provides (see U.S. App. 67a-77a, 110a-112a) do not reflect any finding by the district court about CPC's motivation for allowing Ott and Eiszner to continue running what had been Ott's company, nor do the findings reflect anything reasonably resembling "close control" by CPC "over the day-to-day running of [Ott II]'s business at the Muskegon site."

Attempting to obscure the fact-specific character of the question presented here, the United States recites (Pet. 10-11) the district court's legal conclusions (under its "new, middle ground" standard) that CPC "actively participated in and exerted control over" various aspects of Ott II's business, while carefully eliding the flimsy underlying facts on which those conclusions were based. See pp. 2-7, *supra*. And MDNR asserts (Pet. 19) that the Sixth Circuit did not explicitly reject the district court's findings of fact as clearly erroneous.

But the dearth of factual support for the district court's broad conclusions did not escape the Sixth Circuit's notice. To the contrary, the court of appeals noted that "*[i]f anything*, the *facts* recited by the district court" might "support liability" under a theory of "exertion of power or influence through active participation in the subsidiary's business," but certainly could not support liability based on "actual operation of the subsidiary's business" — much less *operation of its facility*. U.S. App. 12a (emphasis added). As petitioners' factual quibbles make clear (*e.g.*, U.S. Pet. 20 n.6; MDNR Pet. 18-19 & n.4), the Sixth Circuit plainly and dispositively rejected as

factually unsupported the district court's findings on this and other issues. See, *e.g.*, U.S. App. 12a, 18a, 21a-22a, 24a.

C. In another attempt to broaden the significance of the question presented, MDNR asserts (Pet. 14) that the Sixth Circuit overlooked the strict liability that has been implied into CERCLA. But that argument puts the cart before the horse. As the United States acknowledges (Pet. 6), strict liability applies only after the plaintiff "has established the four elements of CERCLA liability." That a defendant is an operator or other responsible party is one of the "four basic elements" that must be proved *before* strict liability attaches. See *id.* at 5. The existence of strict liability does not displace the analysis for determining whether the preconditions for liability apply. As the Sixth Circuit recognized, that persons subject to a definition may be subject to strict liability does not provide a bootstrap justification for broadening the definition to cast "the widest net possible." U.S. App. 9a.

D. At bottom, the question presented by this case is whether the facts showed that two particular parent corporations, CPC and Aerojet, were sufficiently involved in the operation of the Muskegon facility by their subsidiaries to transform them into "operators" of the facility themselves. That issue does not merit the attention of this Court.

This case is of narrow significance for additional reasons. The United States (Pet. 26-27) concedes that it "does not routinely seek to hold parent corporations liable for conditions at a subsidiary's facility." And although the United States now asserts, for litigation purposes, that the conditions at the Muskegon site are "acutely hazardous," the government's inaction belies that claim. At trial, ten years after the Environmental Protection Agency "identified" what it calls "extraordinary public health risks" at the site (U.S. Pet. 9), EPA's sole

response was to engage in planning (U.S. App. 63a) rather than actually remediating those supposedly "acute[]" hazards."[5]

Now that CERCLA has been in place for 17 years, it is safe to assume that the great bulk of sites potentially within the scope of that statute have been identified and relevant litigation commenced, if not concluded. EPA has deleted three-quarters of the sites listed among those potentially requiring remediation, while the National Priorities List has been essentially stable for the past several years, with a handful of additions and deletions annually.[6] As additions to the Priorities List slow to a trickle — and may be legislatively capped before long — the limited importance of parent corporation liability for the operations of subsidiaries can only diminish further. See, *e.g.*, *Senate Legislation Would Make Major Changes In Liability, Site Cleanup*, SOLID WASTE REP., Aug. 21, 1997, at 259.

Finally, any decision by this Court in this case may well be mooted by congressional action. Congress has been considering legislation to restrict the scope of liability under CERCLA. See, *e.g.*, S. 8, 105th Cong., 1st Sess. (1997); H.R. 2727, 105th Cong., 1st Sess. (1997); H.R. 2750, 105th Cong., 1st Sess. (1997); H.R. 2485, 105th Cong., 1st Sess. (1997). See generally Johnson, Note, *Mr. Smith Goes To Washington: 1997 Superfund Amendments*, 31 NEW ENG. L. REV. 1269 (1997). The congressional leadership has made CERCLA reform "an

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[5] According to the EPA, legal disputes "have very little impact on the pace of cleanups." EPA, *The Facts Speak For Themselves: A Fundamentally Different Superfund Program* 9 (Nov. 1996).

[6] See, *e.g.*, *Superfund Reauthorization: Hearings Before the Subcomm. on Water Resources and Environment of the House Comm. on Transportation and Infrastructure*, 105th Cong., 1st Sess. 454 (April 12, 1997) (Testimony of Steven A. Herman, Assistant Administrator, EPA Office of Enforcement and Compliance Assurance, and Timothy J. Fields, Jr., Acting Assistant Administrator, EPA Office of Solid Waste and Emergency Response); U.S. General Accounting Office, GAO/RCED-97-20, *Superfund: Times to Complete the Assessment and Cleanup of Hazardous Wastes* 8 (March 1997) (16 average annual NPL listings 1992-1996).

important priority," *GOP Agenda Includes Bill to Reform Hazardous Waste Cleanups*, DAILY ENV'T REP. (BNA), Jan. 22, 1997, at AA-1, and markup appears imminent for at least one bill. *Boehlert Schedules Markup Date for Bill Despite Differences with Democrats*, DAILY ENV'T REP. (BNA), Nov. 7, 1997, at A-2. Indeed, "[o]ne of the many issues to be tackled" is the standard for holding "shareholders — and parent corporations as controlling shareholders of their subsidiaries — liable as 'owners or operators' of the businesses in which they had an interest." NAT'L L.J., Sept. 22, 1997, at B4. The Senate leadership has conducted "more than 220 hours of discussion and negotiation," and both houses have held hearings on CERCLA reform. *Superfund Legislation: Hearings before the Sen. Environment and Public Works Comm.*, 105th Cong., 1st Sess. (Sept. 4, 1997) (statement of Sen. Chafee); *Boehlert, Browner Face Off at Hearing Over Small Party Definitions, Ground Water*, DAILY ENV'T REP. (BNA), Oct. 30, 1997, at A-5; see also n. 6, *supra*.

Whether CERCLA should alter prevailing state-law standards of parent-subsidiary liability is quintessentially a legislative policy judgment — and a judgment that this Court's precedents require Congress to make clearly if "pre-existing state law" is to be "displace[d]." *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 544-545 (1994). If the issues in this case are as important as petitioners assert, Congress may well enact clarifying amendments to Section 107 and other provisions, perhaps before this Court could hear this case, much less decide it. Such an exercise, particularly at this interlocutory stage, does not warrant the expenditure of this Court's scarce resources.

II. THE SIXTH CIRCUIT CORRECTLY DECLINED TO IMPROVISE A NEW FEDERAL STANDARD OF PARENT-SUBSIDIARY LIABILITY

A. This case not only presents no issues of sufficient general and recurring importance to warrant further review, but the Sixth Circuit correctly applied "traditional concepts of limited liability associated with the corporate form" to structure

its analysis. U.S. App. 12a. "Congress acts * * * against the background of the total *corpus juris* of the states." *Wallis* v. *Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966) (quoting H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 435 (1953)). Limited liability through the use of the corporate form "is ingrained in our economic and legal systems." Douglas & Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 YALE L.J. 193, 193 (1929).

There is no serious dispute that the statutory text of CERCLA does not "express any intention to hold parent corporations or other shareholders individually liable for corporate activities." Farmer, Note, *Parent Corporation Responsibility for the Environmental Liabilities of the Subsidiary: A Search for the Appropriate Standard*, 19 J. CORP. L. 769, 780 (1994). Because Congress did not "speak directly to the question," unless a contrary legislative intent is "evident" statutes that, like CERCLA, "invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles" governing the corporate form. *United States* v. *Texas*, 507 U.S. 529, 534 (1993) (quoting *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952)).

Thus, a "party contending that legislative action changed settled law" has the burden of proving "that the legislature intended such a change." *Green* v. *Bock Laundry Machine Co.*, 490 U.S. 504, 521 (1989). Petitioners cannot carry that burden.[7]

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[7] The legislative history of CERCLA, although sparse on this point, indicates that Congress intended traditional common law principles to govern all interstitial issues of liability. Like the statute itself, the committee reports on CERCLA say nothing about parent-subsidiary liability or piercing the corporate veil. In their nearest approach to the subject, the sponsors of the legislation repeatedly expressed their intent that "issues of liability not resolved by [CERCLA]" should be governed by "traditional and evolving principles of common law." See, *e.g.*, 126 Cong. Rec. 30,932 (1980) (statement of Sen. Randolph); *id.* at 31,965 (statement of Rep. Florio).

Unlike CERCLA, some federal statutes expressly provide that persons normally protected by the corporate veil may be subjected to statutory liability for the acts of their corporations. See, *e.g.*, Clayton Act, 15 U.S.C. § 24; Securities Exchange Act of 1934, 15 U.S.C. § 78p(b); Depository Institution Management Interlocks Act, 12 U.S.C. §§ 3201-3207; I.R.C. § 1239-(b)(2), (3); Fair Labor Standards Act, 29 U.S.C. § 203(r); ERISA, 29 U.S.C. § 1301(b). CERCLA's silence on this issue "is most eloquent" and should be dispositive evidence that Congress did not intend to work "an important and controversial change in existing law" by altering the treatment of the corporate form. *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 266-267 (1979)

The plain meaning of CERCLA likewise supports the Sixth Circuit. Section 107(a)(2), which refers to "any person who * * * operated any facility" (42 U.S.C. § 9607(a)(2)), imposes liability on the persons directly responsible for the day-to-day operations *of the facility* that disposed of the hazardous waste. Yet petitioners' reading would transmute the unadorned word "operator" into "one who owns and oversees a legally separate operator." See *FTC* v. *Sun Oil Co.*, 371 U.S. 505, 515-516 (1963) (favoring "normal and usual meaning" of statutory term over definition that would stretch simple phrase to cover complex two-stage process). By marshaling "all the facts regarding CPC's *involvement with Ott II*" (U.S. App. 110a (emphasis added)), and by holding CPC liable not for operating the Muskegon facility but for allegedly "operating" Ott II — a conclusion that itself was unsustainable — the district court rewrote CERCLA to impose liability upon a person simply for "operating" another legal person that operated a facility, producing the very sort of strained "two-stage" reading rejected in *Sun Oil*, 371 U.S at 514-516.

To the contrary, this Court long ago drew a clear distinction between operating a subsidiary's facility, in that case a railroad, and controlling the subsidiary company. After noting that the parent held virtually all the subsidiary's stock, and the

same individuals held similar positions as directors and management officials within the two companies, the Court nonetheless concluded that the separately incorporated subsidiary "operate[d] its own road." *Pullman's Palace Car Co.*, 115 U.S. at 589, 596. Although "[p]ractically [the parent] may control the [subsidiary] company, * * * the [subsidiary] alone controls its road. In a sense, the stockholders of a corporation own its property, but they are not the managers of its business or in the immediate control of its affairs." *Id.* at 597.

B. Petitioners' contrary argument relies on a patchwork of assumptions and *non sequiturs*, rather than anything that Congress enacted, to override the governing legal principles. The centerpiece of petitioners' argument is that the imposition of liability on "operators" as well as on "owners," along with the unremarkable statutory acknowledgment that a "person" includes a "corporation," evidences congressional intent to do away with the preexisting protections of the corporate form.

As the United States' tour (Pet. 17) through dictionary definitions amply demonstrates, the common meaning of "operate" sheds no light on whether a parent corporation or other majority shareholder of a corporation that operates a facility is itself a second-level operator of the facility as well. Certainly, as the Sixth Circuit observed, "[if Congress wanted to extend liability to parent corporations" in a non-traditional way "it could have done so, and it remains free to do so." U.S. App. 14a (quoting *Joslyn Manufacturing Co.* v. *T.L. James & Co.*, 893 F.2d 80, 83 (5th Cir. 1990), cert. denied, 498 U.S. 1108 (1991)). But what Congress did in many other statutes, see p. 17, *supra*, it did *not* do here.

The decision below in no way blurs the distinction between owner and operator liability. Petitioners apparently believe that the principal distinction between "owning" and "operating" a facility must lie in the methods by which parent corporations

may be held liable under each theory.[8] The distinction based on plain meaning is far simpler. One can be liable as an operator but not an owner by conducting operations at a site that one does not own. Lessees and landowners often are defendants together in CERCLA cases, though the owner conducted no operations and the lessee did not own the site. *E.g.*, *Joslyn Manufacturing Co.* v. *Koppers Co.*, 40 F.3d 750, 753 (5th Cir. 1994); *United States* v. *R.W. Meyer, Inc.*, 932 F.2d 568 (6th Cir. 1991). And a parent corporation could be directly liable as an operator at a facility owned by its subsidiary if, for example, the subsidiary existed only to hold title to real estate. Similarly, as noted above (at p. 10), a parent could "operate" a facility that was owned and also operated by its subsidiary.[9] That might have occurred here had the facts been different: for example, if CPC manufactured corn products at the Muskegon site (and disposed of the wastes) while Ott II made chemicals, or if CPC used the lagoons at Muskegon in order to dump wastes from CPC's own, off-site manufacturing processes. That CPC did none of these things does not mean that the legal definition of "operator" must nullify the corporate form.

Still more circular is the argument that, by including corporations among "persons" potentially liable as operators under CERCLA (see 42 U.S.C. § 9601(21)), Congress silently did away with the usual protections of the corporate form. If corporations were not included among "persons," even Ott II could not be liable as an operator. But the word "corporation"

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[8] MDNR (Pet. 11) objects that, "[u]nder the Sixth Circuit's decision, the standard for determining whether a parent corporation is liable as either an owner or operator would be the same: the facts must support piercing the corporate veil." But that is how American law determines the liability of a parent corporation for obligations of its subsidiary, whether the liability rests on what the subsidiary owned or on what the subsidiary did.

[9] In his seminal article, then-Professor Douglas noted that in this and the preceding example of a parent corporation's direct liability, "no question of vicarious liability [i]s involved" and thus the corporate veil does not need to be pierced. Douglas & Shanks, *supra*, 39 YALE L.J. at 209-210.

does not normally include a separate corporation that is the parent company of the first. Congress easily could have specified "parent corporation of a person" or "majority shareholder of a person" in the definition if it wanted to go beyond the usual scope of liability. It did not.

Finally, the Sixth Circuit was correct in refusing to rely on terms used in definitions adjacent to, but not included in, the relevant definition. The definition of "owner or operator" that applies to this case is purely circular: "any person owning or operating such facility." 42 U.S.C. § 9601(20)(A)(ii). The United States insists here (Pet. 18-19), as it did below, that parent liability should be governed by an *adjacent* definition, applicable only when a governmental authority has come into possession of an *abandoned* facility. In that instance, the statute imposes liability on "any person who * * * otherwise controlled activities" at the facility immediately before abandoning it. But "[a]s this Court has reiterated: 'where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Bates* v. *United States*, No. 96-7185, slip op. 5-6 (U.S. Nov. 4, 1997) (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983)). The Sixth Circuit understood "that the drafters of the statute distinguished an operator from a person who 'otherwise controlled' a facility." U.S. App. 13a.[10]

C. The *ad hoc* "operator" analysis that petitioners endorse is nothing more than a junior-varsity veil-piercing analysis,

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[10] The language of CERCLA also forecloses MDNR's argument (Pet. 10) that "participat[ing] in the management" of a subsidiary renders a parent corporation liable as an operator of the subsidiary's facility. A person who appears to be the legal owner of a facility, but who actually holds only a security interest in the property "without participating in the management of a * * * facility," is not subject to liability. 42 U.S.C. § 9601(20)(A). Thus, Congress restricted liability for merely "participating in the management of a * * * facility" to persons who, but for the operation of the security interest exception, plainly would be liable as owners. *Ibid.*

using the same or similar factors but substantially lowering the threshold for imposing liability. Whether the parent owns all of the stock of the subsidiary, whether there are common directors and officers, whether the parent uses the subsidiary's property, whether the parent exercises control over the subsidiary's business decisions, and whether the parent is involved in the subsidiary's financial affairs all regularly appear in veil-piercing analyses. See P. BLUMBERG, LAW OF CORPORATE GROUPS: PROCEDURAL PROBLEMS IN THE LAW OF PARENT AND SUBSIDIARY CORPORATIONS § 1.02.1, at 16-17 (1983); S. PRESSER, PIERCING THE CORPORATE VEIL § 1.03[4] (1992).[11]

In fact, the principal factors on which the district court and petitioners would rely to make a parent the "operator" of its subsidiary's facility typify the parent-subsidiary relationship. By definition, a parent corporation controls its subsidiary. BLACK'S LAW DICTIONARY 1428 (6th ed. 1990). See 6 Z. CAVITCH, BUSINESS ORGANIZATIONS § 120.05[2] (1993). Thus, almost all parents "participat[e] in the subsidiary's board of directors [and] management" and are involved in "specific policy matters" such as finances. Compare U.S. App. 107a with *Esmark, Inc.* v. *NLRB*, 887 F.2d 739, 759 (7th Cir. 1989), and *Maki* v. *Copper Range Co.*, 121 Mich. App. 518, 328 N.W.2d 430, 433 (1982); see also H. HENN & J. ALEXANDER, LAWS OF CORPORATIONS § 148, at 355 (3d ed. 1983) ("normal" for parent and subsidiary to have "identical directors and officers"); *Maki*, 328 N.W.2d at 432 (parent-subsidiary relation "by definition" includes, *e.g.*, disbursements by parent for subsidiary).

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[11] It should come as no surprise that the factors relied on by the district court in this case (see U.S. App. 66a-78a, 110a-112a) pertain to veil-piercing: one of the first courts to recast a watered-down veil-piercing analysis in terms of "direct" operator liability used the same factors to impose "direct" operator liability as for piercing the corporate veil. See *United States* v. *Kayser-Roth Corp.*, 724 F. Supp. 15, 22, 24 (D. R.I. 1989), aff'd, 910 F.2d 24 (1st Cir. 1990), cert. denied, 498 U.S. 1084 (1991). See U.S. App. 103a-108a (heavily relying on *Kayser-Roth*).

Because ownership of a subsidiary's stock, and the presence of common officers and directors, are "features that are common in most or all parent-subsidiary relationships," they "have been uniformly dismissed as inconsequential in and of themselves." BLUMBERG, *supra* § 1.02.1, at 17-18. In fact, the ultimate question in the district court's analysis, "the parent's exercise of control[,] * * * occurs in every parent-subsidiary relationship." *Id.* at 18. The other factors amount to mere oversight functions and the occasional provision of expertise in specific areas. See *Johnson* v. *Flowers Industries, Inc.*, 814 F.2d 978, 982 (4th Cir. 1987) (role of parent company's regional representative "to ensure that [subsidiary] implements the policy of the parent company" is "characteristic of a parent-subsidiary relationship"); *Maki*, 328 N.W.2d at 433 (refusing to assign significance to likelihood that "parent may monitor the subsidiary's fiscal activities and dealings").

One thing is clear: none of this has anything to do with the statutory standard of whether the parent corporation is actually *operating* its subsidiary's *facility*.

D. Petitioners' invocation of the rule that corporations are liable for the torts of their agents produces another circularity. The individuals through whom petitioners sought to hold CPC liable for Ott II's operations were agents of CPC only if, contrary to well-established precedent (see pp. 10-11, *supra*), dual officers and directors are assumed to be agents of the parent even when they act in their capacities with the subsidiary, or if the corporate separateness of the subsidiary can be assumed away. But petitioners can point to nothing in CERCLA that reflects Congress' intent to override either of those familiar common-law principles. Their argument simply begins from a conclusion and works backward.

* * * * *

"Private parties have relied on state corporation law when making corporate acquisitions and in forming and dissolving corporations." *Anspec Co.* v. *Johnson Controls, Inc.*, 922 F.2d

1240, 1250 (6th Cir. 1991) (Kennedy, J., concurring). The Sixth Circuit properly concluded that the "disrupt[ion of] commercial relationships predicated on state law" is unwarranted where there is no sign that Congress intended to work that result in CERCLA. *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 729 (1979). There is no reason for this Court to a review a decision so squarely in line with governing principles.

III. CPC IS NOT LIABLE AS AN "OPERATOR" OF THE OTT SITE UNDER THE LIABILITY STANDARD SUPPORTED BY PETITIONERS

The petition should be denied for the additional reason that, under any reasonable standard of liability, the result would be the same.[12] Indeed, if the United States truly means to advocate a standard that would impose liability only on parent corporations that "actually participate[] in the *day-to-day operation of a subsidiary and its facility*" (Pet. 27-28; emphasis added), then no liability could attach to CPC, which was far removed from the "day-to-day operation" of Ott II, and still further removed from the actual operation of the Muskegon facility.

Petitioners claim that the holdings of the courts of appeals are "squarely conflicting." U.S. Pet. 28. The conflict is neither as direct nor as deep as petitioners suggest. Only the cases cited from the First Circuit (U.S. Pet. 23) actually imposed liability on parent companies. The Second, Third, Fourth, and Eleventh Circuits have yet to impose "operator" liability on a parent corporation, although the Third Circuit held that the federal government "operated" a plant it commandeered during World

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[12] Like petitioners, we place to one side the outlier decision in *Nurad, Inc.* v. *William E. Hooper & Sons Co.*, 966 F.2d 837 (4th Cir.), cert. denied, 506 U.S. 940 (1992), which suggested (in *declining* to impose liability) that "direct" liability might attach to all majority stockholders of "operators." Although petitioners cannot bring themselves to defend that bizarre conclusion, it is the logical outgrowth of their rejection of traditional veil-piercing principles.

War II, where the government "determined what product the facility would produce, the level of production, the price of the product, and to whom the product would be sold" — none of which CPC did in Muskegon. *FMC Corp.* v. *United States Dep't of Commerce*, 29 F.3d 833, 843 (3d Cir. 1994) (en banc). There is less to the supposed "conflict" than meets the eye.

Moreover, as commentators have observed, although courts may vary in their formulations, "the liability of a parent corporation is the same regardless of whether liability is premised on traditional corporate law," as in the Fifth Circuit's 1990 *Joslyn* decision and the decision below, or on "direct statutory liability under CERCLA," as in *United States* v. *Kayser-Roth*, 910 F.2d 24 (1st Cir. 1990), cert. denied, 490 U.S. 1084 (1991), based on a perception that Congress modified traditional corporate law by using the word "operator." Oswald & Schipani, *CERCLA and the "Erosion" of Traditional Corporate Law Doctrine*, 86 NW. U. L. REV. 259, 315 (1992). This case illustrates the point.

A. Aside from the United States' hint noted above, petitioners do not articulate the precise standard of parent corporation "operator" liability that they urge this Court to adopt. The United States cites (Pet. 22) four decisions from other circuits that "essentially agree with the standard that the United States urges"; MDNR appears to support a similar standard. See *Kayser-Roth*, 910 F.2d 24; *Schiavone*, 79 F.3d 248; *Lansford-Coaldale*, 4 F.3d 1209; *Jacksonville Electric Authority* v. *Bernuth Corp.*, 996 F.2d 1107 (11th Cir. 1993). But several of the cited cases themselves sidestep a definition of the governing standard. The First Circuit in *Kayser-Roth* candidly acknowledged that its decision did not decide "the exact standard necessary for a parent to be an operator." 910 F.2d at 27. Similarly, in *Schiavone*, the Second Circuit noted that it, too, had not endorsed any standard of parent corporation liability and "decline[d] to do so." 79 F.3d at 254 n.5; see also *Certain Underwriters at Lloyd's* v. *St. Joe Minerals Corp.*, 90

F.3d 671, 674 (2d Cir. 1996) (again declining to identify standard).

To a substantial degree, therefore, the decisions upon which petitioners rely are self-consciously fact-bound. Indeed, in the Second Circuit's view, the determination "whether there exists control sufficient for the imposition of operator liability" requires "an inherently fact-intensive inquiry." *Schiavone*, 79 F.3d at 255. The Third Circuit agrees that the inquiry is "inherently fact-sensitive" and requires "consideration of the totality of the circumstances presented." *Lansford-Coaldale*, 4 F.3d at 1222.

To the extent that these cases express a rule of law, it is that a parent corporation will be held liable as an "operator" of a facility operated by its subsidiary if the parent exercises "pervasive control" over the subsidiary. *E.g.*, *Kayser-Roth*, 910 F.2d at 27. See U.S. Pet. 23. The First Circuit in *Kayser-Roth* affirmed the imposition of "operator" liability on a parent that had exercised "total influence and control" and "pervasive control" over its subsidiary. 910 F.2d at 27 (quoting district court decision). (Indeed, the First Circuit had no need to go beyond veil-piercing, as the district court had also pierced the corporate veil. See 724 F. Supp. at 24.) Likewise, in *Jacksonville Electric*, the Eleventh Circuit suggested that a parent corporation would be liable for the operations of its subsidiary only if the parent "exercises actual and pervasive control of the subsidiary to the extent of actually involving itself in the daily operations of the subsidiary." 996 F.2d at 1110 (quoting district court opinion). And the Third Circuit held in *Lansford-Coaldale* that a parent corporation could be liable as an "operator" for the operations of its subsidiary if the evidence "sufficiently demonstrate[d] pervasive control." 4 F.3d at 1222 n.13.

2. Although the district court broadly *concluded* that CPC "controlled" Ott II, the *facts* found by the district court make clear that CPC did not exercise "pervasive control" over operations at the Muskegon facility. The district court did not

ven find that CPC exercised "pervasive control" over Ott II (much less its waste disposal "facility").

In fact, CPC would not be deemed a CERCLA "operator" of the Muskegon facility under any reasoned application of the standard that petitioners advance. Ott II's overall policies were established by *its* board of directors, which "was an active board during CPC's period of ownership, continuing the tradition established in the Ott I era of functioning in an engaged, participatory manner," and was "[f]ar more than a rubber stamp for management." U.S. App. 67a. Day-to-day operations at the Muskegon site were conducted by Ott II managers, *not* by CPC: "Ott II corporate officers set the day-to-day operating policies for the company without any need to obtain formal approval from CPC"; "Ott II management formulated and implemented the company's day-to-day operating policies, including sales, marketing, advertising, the purchase of raw materials, research and development, hiring and personnel policies, capital expenditures, manufacturing and environmental matters." *Id.* at 69a. Compare *Kayser-Roth*, 910 F.2d at 27.

The district court also found that Ott II operated essentially as Ott I had operated. Using the same personnel and the same officers as Ott I, Ott II manufactured the same products as Ott I and sold those products to Ott I customers under the same Ott nameplate. U.S. App. 66a. These findings belie the district court's ultimate legal conclusion that somehow CPC took over operations at Ott II's Muskegon site.

Indeed, the district court never even squarely addressed whether CPC actually operated the Muskegon *facility* (as opposed to "operating" the overall business of Ott II, which among other things included the sale of chemicals as well as their manufacture at the Muskegon and Charlotte plants). But, as noted above, CERCLA does not impose liability on persons that operate *other persons*; a person is liable only for operating a *facility*, that is, the building, ditch, or other area where hazardous waste has been deposited. See 42 U.S.C. § 9601(9);

Nurad, Inc. v. *William E. Hooper & Sons Co.*, 966 F.2d 837, 842-843 (4th Cir.), cert. denied, 506 U.S. 940 (1992). As the court of appeals correctly pointed out, the theory that CPC might be liable under Section 107(a)(2) because it actually conducted day-to-day operations at the Muskegon site was neither "relied upon by the district court" nor "supported by the facts in the record." U.S. App. 18a.

Instead, the district court relied on the mere presence of individuals with CPC affiliations serving in the management and on the board of Ott II to support "operator" liability:

> When a parent corporation permeates the board, management and decision making of a wholly owned subsidiary that was disposing of hazardous waste, operator liability directly attaches under CERCLA.

U.S. App. 111a-112a. The other factors — CPC's ownership of 100% of Ott II's stock, its approval of large capital expenditures and review of budgets through CP Development, its assistance on a handful of occasions in labor negotiations and environmental matters, and its intermittent provision of a few other corporate services (U.S. App, 110a-111a) — plainly do not demonstrate "pervasive control" by CPC over day-to-day operations at the Muskegon site, much less control over the use of the "facility" at issue, *i.e.*, the lagoons and other areas where wastes were deposited.

As explained above (at pp. 2-4), the actual participation by persons having an affiliation with CPC in Ott II's management was extremely limited; the district court premised CPC's operator liability primarily on CPC's *leaving Ott I officers* (Eiszner and Ott) *in place* while assigning them separate duties for CPC. But if CPC can be held liable as an "operator" of Ott II's Muskegon facility based upon the acts of employees such as Ott and Eiszner, then any meaningful use of dual directors or officers would subject every parent corporation to CERCLA

liability for the operations of its subsidiary.[13] Because the use of officers and directors in dual capacities is a hallmark of the parent-subsidiary relationship, see HENN & ALEXANDER, *supra*, § 148 at 355, this factor is no evidence of the parent corporation's "control" over its subsidiary as urged in the petitions.

In any event, several of the cases on which petitioners rely have explicitly recognized that the mere presence of parent corporation employees in the management of a subsidiary or on its board is *not* evidence of "pervasive control" by the parent. In *United States* v. *TIC Investment Corp.*, 68 F. 3d 1082 (8th Cir. 1995), cert. denied, 117 S. Ct. 50 (1996), the Eighth Circuit applied a "pervasive control" analysis in deciding not to hold dual parent companies liable as "arrangers" under CERCLA Section 107(a)(3) for disposal that their subsidiaries had "arranged." The Eighth Circuit found no significance in the participation by the parents' employees in the subsidiary's management and on its board of directors: the "mere fact that * * * individuals who were officers and directors for [the parents] concurrently served as officers and directors for [the subsidiary]" did not even "*tend* to establish" liability. *Id.* at 1092 (emphasis added).

In rejecting "operator" liability in another dual-parent setting, the Third Circuit held that majority representation on the subsidiary's board, along with representation in management, did not amount to "pervasive control" of the subsidiary. *Aluminum Co. of America v. Beazer East, Inc.*, 124 F.3d 551 (3d Cir. 1997). The Third Circuit noted that there was no evidence that the parent corporations' representatives who served on the subsidiary's board or in its management "made any decision that was dictated by [the parents] or otherwise exhibited divided loyalty when attending to [the subsidiary's] business." 124 F.3d at 564. And the Eleventh Circuit in

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[13] In this regard, the United States' self-serving and unsupported assertion (Pet. 26-27) that "many parent corporations do not engage in the type of active participation and control shown here" is particularly disingenuous.

Jacksonville Electric similarly held that the presence of trustees of the parent as directors and officers of the subsidiary did *not* indicate pervasive control, and affirmed a defense judgment. 996 F.2d at 1010-1011.

These decisions make clear that, even under a "pervasive control" analysis, participation by a parent in its subsidiary's business through representation by parent corporation employees in management and on the subsidiary's board amounts to appropriate parental oversight and does *not* form a basis for the imposition of "operator" liability. And as the Sixth Circuit noted, nothing else in the record supports the district court's conclusion. U.S. App. 18a. Because review here could not change the ultimate result, this case would be a poor vehicle even if review of the Sixth Circuit's fact-intensive inquiry were otherwise warranted.

CONCLUSION

The petitions for a writ of certiorari in Nos. 97-296 and 97-454 should be denied.

Respectfully submitted.

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NOVEMBER 1997

(4) (3)

FILED
NOV 12 1997
CLERK

No. 97-296 and 97-464

In the Supreme Court of the United States

OCTOBER TERM, 1997

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY, PETITIONER

v.

CPC INTERNATIONAL, INC., ET AL.

CPC INTERNATIONAL, INC., CROSS-PETITIONER

v.

AEROJET-GENERAL CORPORATION, ET AL.

ON PETITION AND CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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15 pp

QUESTIONS PRESENTED

1. Whether a parent corporation can be held directly liable under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9607(a)(2), as an operator of its wholly-owned subsidiary's facility, based on the parent corporation's own actions in directing the operation of the facility at the time of disposal of hazardous substances (Question Presented in No. 97-296).

2. Whether, if the Court grants the petition for a writ of certiorari in No. 97-296, it should also review the Sixth Circuit's holding that Aerojet-General is not liable as an "operator" (Question Presented in No. 97-464).

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-296

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY, PETITIONER

v.

CPC INTERNATIONAL, INC., ET AL.

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AEROJET-GENERAL CORPORATION, ET AL.

ON PETITION AND CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

STATEMENT

The Michigan Department of Environmental Quality (MDEQ) seeks review of a decision of the United States Court of Appeals for the Sixth Circuit in

United States v. *Cordova Chemical Co.*, 113 F.3d 572 (1997) (en banc). See 97-296 Pet. App. 1a-42a. The decision holds, among other things, that two corporations, CPC International, Inc. (CPC), and Aerojet-General Corporation (Aerojet), are not liable to the United States and the MDEQ, under Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9607(a), for the governments' expenses in responding to releases of hazardous substances from a facility located near Muskegon, Michigan. The United States has also filed a petition for a writ of certiorari seeking review of that decision. *United States* v. *CPC, Int'l, Inc.*, petition for cert. pending, No. 97-454 (filed Sept. 10, 1997). The United States' petition sets forth the facts and procedural history of the case in the lower courts. See 97-454 Pet. 3-14.

The United States and the MDEQ have raised the same issue in their respective petitions for a writ of certiorari. Each urges that the court of appeals erred in ruling that a parent corporation that actively participates in, and exercises control over, a wholly-owned subsidiary's facility does not qualify as an "operator" of the facility. Compare 97-454 Pet. I, 15-21, with 97-296 Pet. i, 8-19. The petitions differ, however, in that the United States seeks relief against both CPC and Aerojet, while the MDEQ seeks relief only against CPC. Compare 97-454 Pet. II, 20-21, with 97-296 Pet. ii, 4. The MDEQ's decision to seek relief against only one of the companies has prompted CPC to file a conditional cross-petition urging that, if the Court grants the MDEQ's petition, it should review Aerojet's liability as well. See 97-464 Pet. i, 4-7.

ARGUMENT

The United States submits this brief to explain our understanding of the relationship between the United States' petition for a writ of certiorari, the MDEQ's petition for a writ of certiorari, and CPC's conditional cross-petition. As described below, the United States and the MDEQ each have important and complementary interests in the issue presented by their petitions, but, as a consequence of CERCLA's statutory provisions and the facts of this particular case, their interests are not entirely congruent. The United States and the MDEQ agree on the question of law at issue here. The United States suggests, however, as a matter of sound procedure, that the Court should hold the MDEQ's petition and CPC's conditional cross-petition pending the Court's disposition of the United States' petition in No. 97-454, which places before the Court all of the relevant parties and all of the relevant claims.

1. As noted in the United States' petition (97-454 Pet. 3-6), Congress enacted CERCLA to create a comprehensive federal program for addressing the national problem posed by decades of improper disposal of hazardous substances. CERCLA authorizes the United States to undertake direct response actions to protect the public from the release and threatened release of hazardous substances. See CERCLA § 104, 42 U.S.C. 9604. CERCLA also grants the United States authority to issue orders and to seek injunctive relief to compel persons to respond to releases, or threats of release of those substances. See CERCLA § 106, 42 U.S.C. 9606.

CERCLA provides a mechanism for financing government-initiated cleanups of hazardous waste

sites and recovering those costs from the responsible parties. Upon satisfying statutory conditions, the United States may use the "Hazardous Substance Superfund" as the initial source of funding for federal response actions. See CERCLA §§ 101(11), 104, 42 U.S.C. 9601(11), 9604; 26 U.S.C. 9507. The United States may then bring judicial actions against responsible parties under Section 107 of CERCLA to recover the government's response costs and replenish the Superfund. 42 U.S.C. 9607.

The individual States have a significant role in federally-financed cleanups. Of particular relevance here, Section 104(c)(3) of CERCLA requires each State to provide cost-sharing and other assurances before any Superfund-financed remedial action may take place. Section 104(c)(3) provides in relevant part:

> The President shall not provide any remedial actions pursuant to this section unless the State in which the release occurs first enters into a contract or cooperative agreement with the President providing assurances deemed adequate by the President that (A) the State will assure all future maintenance of the removal and remedial actions provided for the expected life of such actions as determined by the President * * * and (C) the State will pay or assure payment of (i) 10 per centum of the costs of the remedial action, including all future maintenance [or (ii) 50 percent or more in circumstances where the State operated the facility at which the release occurred].

42 U.S.C. 9604(c)(3). In other words, the State is responsible for (1) paying 10 percent of the costs of a Superfund-financed "remedial action" at a facility that has not been operated by the State, and (2) fully

funding the costs of "maintenance" of the remedial action under CERCLA. See 40 C.F.R. 300.435(f), 300.510; see also *Ohio* v. *EPA*, 997 F.2d 1520, 1543-1545 (D.C. Cir. 1993).

Section 104(c)(6) of CERCLA provides that, for purposes of subsection (c)(3) cost share and maintenance responsibilities, treatment measures necessary to restore ground or surface water quality shall be considered "remedial action," rather than "operation and maintenance," for a period of up to ten years after commencement of operations, or until the ground or surface water quality is restored to a level that ensures protection of human health and the environment.[1] 42 U.S.C. 9604(c)(6); see 40 C.F.R. 300.435(f)(3). Consequently, for groundwater treatment remedies (such as the one being implemented at the "Muskegon" site), the United States contributes 90 percent of the funding for the operation and maintenance of the groundwater treatment remedy, and the State contributes the remaining 10 percent of the funding, for up to ten years after the remedy becomes operational. Thereafter, the State pays the full maintenance costs for the groundwater treatment measure.

2. The United States has incurred the bulk of the response costs to date for cleaning up the hazardous conditions at the Muskegon site. Nevertheless. the MDEQ (which was formerly known as the Michigan Department of Natural Resources (MDNR)), has also

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[1] The Section 104(c)(6) provisions were added to CERCLA through the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, § 104(i), 100 Stat. 1620; see also H.R. Rep. No. 253, 99th Cong., 1st Sess., Pt. 1, at 60, 70 (1985); *Ohio* v. *EPA*, 997 F.2d at 1544.

incurred significant response costs at the site. See, *e.g.*, 97-296 Pet. App. 82a-83a (stipulation and order entered in April 1992 by the district court indicating that the MDNR had incurred $1.65 million in past response costs); see also 97-296 Pet. App. 80a. Both the United States and the MDEQ will also incur future response costs at the Muskegon site.

Most significantly, the MDEQ will be obligated to pay its statutory cost-share of implementing the groundwater treatment measure at the site. The EPA has not yet declared the groundwater treatment remedy "operational and functional." See 40 C.F.R. 300.435(f)(3). Once it does so, Section 104(c) of CERCLA will require the MDEQ to pay 10 percent of the operation costs for up to ten years and to pay the full costs of operation and maintenance in the ensuing years. 42 U.S.C. 9604(c). The EPA currently estimates that the long-term operation of that remedy will last approximately 30 years and, therefore, that the present value of the MDEQ's financial commitment at this site is likely to be substantial.

3. Section 107 of CERCLA provides that the United States, as well as a State, may recover response costs from the parties that Congress has deemed liable under the statute. See CERCLA § 107, 42 U.S.C. 9607. In the instant case, the United States filed a cost recovery action under Section 107 of CERCLA to recover its response costs at the Muskegon site against CPC, Aerojet, Aerojet's subsidiaries, Cordova Chemical Company (Cordova/California) and Cordova Chemical Company of Michigan (Cordova/Michigan), and Arnold Ott. See 97-296 Pet. 5. The MDEQ initially was drawn into this dispute because CPC and Aerojet filed contribution actions against the MDNR. The MDNR later filed a counter-

claim against CPC and a cross-claim against Aerojet and the Cordova subsidiaries for cost recovery and contribution. *Ibid.*[2]

The MDEQ also has an unusual financial interest in the instant cost-recovery action against CPC and Aerojet that arises from the pre-litigation history of the Muskegon site. In 1977, Aerojet's subsidiary, Cordova/California, purchased the site and also entered into an agreement with the MDNR under which Cordova/California agreed to undertake certain clean-up actions, the MDNR agreed to share in the funding of those actions, and the MDNR agreed to indemnify Cordova/California for other expenses. 97-296 Pet. App. 105a-112a. The Michigan state courts have held that because of that agreement, the MDNR must indemnify Aerojet and its Cordova subsidiaries against any CERCLA liability that they may incur at the Muskegon site. See *Cordova Chemical Co.* v.

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[2] CPC actually initiated the legal actions by filing contribution actions in anticipation of the United States' suit. See 97-296 Pet. 4-5. CPC sued not only the MDNR, but also Aerojet, the Cordova subsidiaries and ultimately CPC's insurer, while Aerojet and the Cordova subsidiaries filed claims against CPC. 97-296 Pet. 5. The district court, which consolidated the actions for resolution in three phases (liability, remedy, and insurance coverage, 97-296 Pet. App. 139a-140a), has not resolved any of the contribution claims brought by the companies against each other. *Ibid.*; see *id.* at 81a. The district court dismissed contribution claims brought by CPC and Aerojet against the MDNR under CERCLA, holding that the MDNR was not liable as an operator under Section 107(a)(2) or as an arranger for disposal of hazardous waste under Section 107(a)(3). See 97-296 Pet. App. 127a-131a, 138a. The court of appeals affirmed the district court's decision regarding arranger liability, the only claim against the MDNR that was appealed. See *id.* at 13a-14a.

MDNR, 536 N.W.2d 860 (Mich. Ct. App. 1995), appeal denied, 554 N.W.2d 319 (Mich. 1996) (Table).

The MDEQ's petition indicates that the MDEQ does not seek relief against Aerojet, but seeks review of only that portion of the court of appeals' judgment pertaining to the liability of CPC as an operator of the Muskegon site under Section 107(a)(2) of CERCLA. See 97-296 Pet. ii, 4. As CPC's conditional cross-petition suggests, the MDEQ appears to have limited its requested relief in that way to avoid subjecting itself to potential liability as Aerojet's indemnitor. See 97-464 Pet. 5 & n.4. The United States, by contrast, has sought relief against both CPC and Aerojet because, in the United States' view, they are both directly liable as "operators" under CERCLA.[3] See 97-454 Pet. 20-21.

4. As the foregoing discussion indicates, the United States has the predominant interest in the outcome of this case under the CERCLA framework, but the MDEQ also has substantial interests under CERCLA. The MDEQ's position in this case appears to be affected, however, by its potential financial obligations under an indemnity agreement with one of the respondents, which has prompted CPC to file its conditional cross-petition. The United States sub-

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[3] This does not mean, of course, that they ultimately would be subject to the same monetary assessment for the conditions at the Muskegon site. Under CERCLA's statutory contribution provisions, if CPC and Aerojet are found to be jointly and severally liable, they would be entitled as a matter of contribution to obtain an equitable allocation of their respective shares of the response costs. See CERCLA § 113(f)(1), 42 U.S.C. 9613(f)(1) ("In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.").

mits that, if (as we urge) the Court decides to grant review in this case, it can most effectively accommodate the various interests of the parties by holding the MDEQ's petition and CPC's cross-petition until the Court resolves the issue set out in the United States' petition for writ of certiorari. That procedure would place all of the relevant parties and claims before the Court.

The United States' petition and the MDEQ's petition present an identical legal question for the Court's review. They differ only in that the United States seeks reversal of the court of appeals' judgment with respect to both CPC and Aerojet, while the MDEQ seeks reversal solely with respect to CPC. Hence, the MDEQ could pursue its specific claim against CPC as a respondent supporting the United States' position under Rule 12.6 of the Rules of this Court, while the MDEQ's own petition remains pending for appropriate relief should that position prevail. At the same time, the United States' request for relief against both CPC and Aerojet would also satisfy CPC's concern that the Court also consider the potential liability of Aerojet. Because the United States' petition effectively places all of the relevant parties and issues before the Court, there is no need to follow the procedurally cumbersome course of granting two petitions and a conditional cross-petition to achieve the same result.[4]

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[4] In light of CPC's concerns about its liability vis-à-vis Aerojet, we note that the United States had settlement discussions with the MDEQ and Aerojet before filing its petition in this case, and those discussions are likely to continue. The United States is, of course, receptive to resolving the liability of potentially responsible parties through settlement on reasonable terms and in accordance with the provisions of

CERCLA. Under CERCLA's provisions, such settlements affect the rights of other parties to contribution from the settling parties. See CERCLA § 113(f)(2), 42 U.S.C. 9613(f)(2). In the event that the United States, the MDEQ, and Aerojet should ultimately reach agreement respecting Aerojet's liability, the proposed settlement agreement would be formalized in a proposed consent decree that would be subject to public notice and comment before receiving final approval. See CERCLA § 122(d)(2)(B), 42 U.S.C. 9622(d)(2)(B); 28 C.F.R. 50.7.

Under the United States' standard practice in CERCLA cases, a proposed consent decree is lodged in the district court in which the action is pending, and the United States publishes a notice of the proposed consent decree in the Federal Register. Persons who are not parties to the proposed consent decree are given at least 30 days before its entry as a final judgment to provide comments. The United States considers, and files with the court, all such comments, and the United States may withhold its consent to the proposed decree if the comments "disclose facts or considerations which indicate that the proposed judgment is inappropriate, improper, or inadequate." CERCLA § 122(d)(2)(B), 42 U.S.C. 9622(d)(2)(B); see 28 C.F.R. 50.7. Furthermore, in approving a consent decree, a district court must determine that the settlement is reasonable, fair, and consistent with the purposes that CERCLA is intended to serve. See, *e.g.*, *United States* v. *Charter Int'l Oil Co.*, 83 F.3d 510, 515 (1st Cir. 1996); *United States* v. *Hercules, Inc.*, 961 F.2d 796, 800 (8th Cir. 1992); see also H.R. Rep. No. 253, 99th Cong., 1st Sess., Pt. 3, at 19 (1985).

Hence, in the event that settlement discussions resume while this case is pending before the Court and an agreement is reached, CPC would have a full opportunity to comment on the proposed terms and raise objections before the agreement is entered as a final consent decree.

CONCLUSION

The petition for a writ of certiorari in No. 97-296 and the conditional cross-petition in No. 97-464 should be held and disposed of in accordance with this Court's disposition of the United States' petition for a writ of certiorari in No. 97-454.

Respectfully submitted.

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NOVEMBER 1997

(5) (1) (5)

Nos. 97-296, 97-454 and 97-464

Supreme Court, U.S.
FILED
DEC 10 1997
CLERK

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1996

UNITED STATES OF AMERICA (#97-454) and MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY (# 97-296),
Petitioners
v.
CPC INTERNATIONAL, INC., et al.
Respondents
and
CPC INTERNATIONAL, INC. (# 97-464),
Cross-Petitioner
v.
AEROJET-GENERAL CORPORATION, et al.,
Respondents

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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SUPPLEMENTAL BRIEF OF AEROJET-GENERAL CORPORATION, CORDOVA CHEMICAL COMPANY OF MICHIGAN AND CORDOVA CHEMICAL COMPANY OPPOSING PETITIONS

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RULE 29.6 STATEMENT

The parent company of Cordova Chemical Company of Michigan is Cordova Chemical Company. The parent company of Cordova Chemical Company is Aerojet-General Corporation. The parent company of Aerojet-General Corporation is GenCorp, a publicly traded company. The filing parties do not have non-wholly-owned subsidiaries, but Aerojet-General Corporation does hold less than 1% of the stock of Megabar Explosives Corp., a Utah corporation.

SUPPLEMENTAL ARGUMENT

The United States, No. 97-454, seeks review of the decision of the United States Court of Appeals for the Sixth Circuit in *United States v. Cordova Chemical Co. of Michigan*, 113 F.3d 572 (6th Cir. 1997) (en banc). The Michigan Department of Environmental Quality ("MDEQ"), No. 97-296, seeks review of only the portion of that decision affecting respondent CPC International, Inc. ("CPC"). CPC opposes the petitions but has also filed a conditional cross-petition, No. 97-464, regarding the decision in favor of respondent Aerojet-General Corp. ("Aerojet"). Aerojet has filed a Brief in Opposition to the petitions.

Aerojet submits this Supplemental Brief under Rule 15.8 to address two matters arising after the filing of its Brief in Opposition. The first new matter is the *en banc* decision of the Sixth Circuit in *Donahey v. Bogle*, ___ F.3d ___, 1997 U.S. App. LEXIS 32146 (6th Cir. Nov. 17, 1997). The second is the United States' request that the MDEQ's petition in No. 97-296 and CPC's conditional cross-petition in No. 97-464 be held in abeyance pending the Court's disposition of the United States' petition in No. 97-454.

1. On November 17, 1997, the United States Court of Appeals for the Sixth Circuit, sitting *en banc*, issued its opinion in the case of *Donahey v. Bogle, supra*. In *Donahey*, the Sixth Circuit again recognized the potential for both direct and derivative theories of operator liability under § 107(a)(2) of CERCLA. *Donahey* involved, among other things, the issue of the operator liability of a 100% stockholder of a polluting company. The Sixth Circuit found the veil-piercing analysis of *Cordova* equally applicable to *Donahey* and held that the 100% stockholder was on the facts of the case not liable as an operator for the cleanup of the property at issue. *Donahey*, 1997 U.S. App. LEXIS 32146, *15-

16. The Sixth Circuit in *Donahey* also noted that *Cordova* provided for § 107(a)(2) operator liability for parent corporations that "directly operate" a facility, but concluded that a scenario supporting such direct liability was not before the court in *Donahey*. *Id.* at *16 n.7. Thus, the Sixth Circuit has once again recognized both direct and derivative theories of operator lability, contrary to the claim of the United States. The only remaining issue is whether the Sixth Circuit properly applied the theories to the facts of both cases. This Court should not spend its time policing particular applications of settled legal theories.

2. The United States requests that the MDEQ's petition, No. 97-296, and CPC's conditional cross-petition, No. 97-464, be held in abeyance pending the Court's disposition of the United States' petition, No. 97-454, but the reason the United States gives for its request actually supports denial of all these petitions without delay. According to the United States, the MDEQ has a unique interest in the outcome of the case because the Michigan Court of Appeals has held that the MDEQ must reimburse Aerojet and its subsidiaries for any CERCLA liability they may incur at the site. As set forth in Aerojet's Brief in Opposition, *see* Aerojet Br. Opp. at 12, 16-17, the MDEQ's reimbursement obligation actually supports prompt denial of all petitions with regard to Aerojet, because taxpayers will bear the ultimate financial responsibility for any liability assigned to Aerojet and its subsidiaries — precisely the result the United States asserts that it seeks to avoid in filing its petition. Moreover, denial of the petitions with regard to Aerojet will still allow both the state and federal governments to obtain complete relief from CPC if they prevail on the merits. Accordingly, while Aerojet agrees that the MDEQ has a unique interest in the outcome of this case, such

interest does not justify holding some of the petitions in abeyance and further prolonging this already protracted litigation.[1]

The United States' submission also discloses another basis to deny the petitions on claims against Aerojet without delay. The United States notes that settlement discussions with the MDEQ and Aerojet could ultimately lead to an agreement that would moot the claims against Aerojet and bar any future contribution actions under § 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2).[2] This

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[1] Even though none of the governmental parties could possibly be prejudiced by prompt denial of the United States' petition and CPC's conditional cross-petition on the claims against Aerojet, CPC argues that its potential contribution claim against Aerojet may be compromised. But CPC's argument ultimately dissolves into nothing more than a desperate plea to this Court to save CPC from the natural consequences of its own voluntary decision to abandon contribution claims in this litigation. In its Reply Brief, CPC attempts to dodge this problem by blatantly mischaracterizing Aerojet's position with a selective quotation from Aerojet's Brief in Opposition. Contrary to CPC's characterization, Aerojet has never claimed that CPC abandoned its contribution claims for all time, and has never challenged CPC's statement that contribution claims have been reasserted in a *new* lawsuit still pending in district court (No. 1:94-CV-432 (W.D. Mich.)). Aerojet has stated only that CPC abandoned its contribution claim *in this litigation,* which is indisputably true. Whether CPC has reasserted a contribution claim in new litigation involving a different matrix of parties and claims has no bearing on whether this Court should choose to review issues *in this litigation* that have no practical impact on claims remaining *in this litigation.*

[2] Even if no new settlement is reached, the 1977 Stipulation and Consent Order with the State of Michigan was itself a resolution of liability to the State within the meaning of § 113(f)(2) that should bar both the State's claim against Aerojet and the contribution claim asserted by CPC. The district court rejected this contention. The parties briefed

Court should not devote its resources to a matter that the petitioning party acknowledges may settle before hearing.

CONCLUSION

The Petition for a Writ of Certiorari filed by the United States (No. 97-454) should be denied. Alternatively, even if the Court decides to grant this petition, it should do so only with respect to the claims against CPC. The Court should further deny the Conditional Cross-Petition of CPC (No. 97-464).[3]

December 8, 1997

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the issue on appeal, but the Sixth Circuit did not address it. CPC's potential contribution claim, which is no longer a part of this litigation and which is not viable in any event under § 113(f)(2), does not provide a sufficient justification for granting certiorari on the claims against Aerojet.

[3] No relief is sought against Aerojet or its subsidiaries in the Petition of the MDEQ (No. 97-296).

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